IN THE

Supreme Court of the United States

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OCTOBER TERM, 1957 — No. 947

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH, MAYOR OF THE CITY OF PHILADELPHIA, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST AND ROBERT FELDER,

Appellants,

vs.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA AND THIRTEEN SUBSTITUTED TRUSTEES OF THE ESTATE OF STEPHEN GIRARD, Deceased,

Appellees

On appeal from the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

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On Appeal from the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

OPINIONS DELIVERED IN THE COURTS BELOW

This proceeding, now before this Court for the second time, was initiated in the Orphans' Court of Philadelphia County by appellants William Ashe Foust and Robert Felder, who sought admission to Girard College in Philadel-

phia. The requests for admission were supported by the Mayor and the Commission on Human Relations of the City of Philadelphia, and the Attorney General of the Commonwealth of Pennsylvania. The Orphans' Court in 1955, over federal constitutional objections, held that the Board of Directors of City Trusts, charged with administering Girard College on behalf of the City of Philadelphia, as trustee under the will of Stephen Girard, rightly refused admission to Negro appellants solely because they are Negroes; and in accordance with this conclusion Negro appellants' complaint was dismissed. 4 D. & C. 2d 671 (Orph. Ct. Phila., 1955).

The first opinion of the Supreme Court of Pennsylvania sustaining Negro appellants' exclusion (Musmanno, J., dissenting) is reported at 386 Pa. 548, 127 A. 2d, 287 (1956).

On April 29, 1957, this Court, in a *per curiam* opinion, held that the Board of Directors of City Trusts' action in excluding Negro appellants from Girard College because of their race contravened Negro appellants' rights under the Fourteenth Amendment; and this Court accordingly remanded the case for proceedings not inconsistent with its opinion. *Pennsylvania v. Board of Directors of City Trusts*, 353 U. S. 230.

On remand, the Supreme Court of Pennsylvania in a *per curiam* order (7 Fiduc. Rep. 555 (Pa.)) returned the case to the Orphans' Court of Philadelphia County for proceedings not inconsistent with this Court's opinion. Two members of the Court filed elaborate opinions dissenting for opposite reasons, neither of which was reported, but appear in the Joint Record of Appellants (J.R.) before the court below at the indicated pages. Mr. Justice Bell would have remanded the case with instructions to the Orphans' Court to remove the Board of City Trusts as trustee and substitute trustees none of whom are officers or employees of the State or City (J.R. 45a). Mr. Justice Musmanno believed the opinion of this Court required the

court below to remand with directions to admit the Negro appellants to the school (J.R. 49a).

Without any "further proceedings" as directed by this Court, and without notice or hearing, and without the request of any party to the litigation, by amendment or otherwise, the Orphans' Court of Philadelphia County on its own motion ordered the removal of the Board of Directors of City Trusts of the City of Philadelphia as trustee under the will of Stephen Girard; this removal, therefore, was not only from the trust for Girard College, but from all of the trusts created by the will. The Court ordered the substitution of a group of thirteen individuals, six of whom are members of the Board of Directors of City Trusts. The individual trustees have been ordered to administer not only Girard College, but the entire estate, conditioned upon their resignation from the said Board of City Trusts. In the same order, the Orphans' Court decreed that "the petitions of William Ashe Foust and Robert Felde for admission to Girard College are dismissed." Shortly thereafter the Orphans' Court denied rehearing. Its opinions and orders are reported at 7 Fiduc. Rep. (Pa.) 555, 606-610.

On January 24, 1958, the Supreme Court of Pennsylvania (by a 4 to 1 vote, Mr. Justice Musmanno dissenting) affirmed the order dismissing the Board of City Trusts as trustee, substituting individual trustees and excluding Negro appellants. This decision, from which the instant appeal is prosecuted, is reported at 391 Pa. 434 and the opinions are annexed hereto as Appendix A, *infra*, p. 39 et seq.

On February 12, 1958, the Supreme Court of Pennsylvania denied a timely petition for rehearing, but rendered no further opinion.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment herein sought to be reviewed is one in which the Supreme Court of Pennsylvania, for the second time, has sustained Negro appellants' exclusion from Girard College solely because they are Negroes.

The opinion and judgment of the Supreme Court of Pennsylvania were handed down on January 24, 1958. A timely petition for rehearing was denied on February 12, 1958, and notice of appeal to this Court was filed in the court below on April 10, 1958.

The appeal jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(2), which provides for a review by appeal of final judgments of the highest state court in which decision could be had sustaining the validity of a state statute against a claim of repugnancy to the Constitution of the United States. The state statute sustained by the Supreme Court of Pennsylvania in the present proceeding is the Fiduciaries Act of April 18, 1949. P. L. 512, Sec. 831(5), the relevant provisions of which are set out verbatim in Appendix B, *infra*, pp. 91-92. That statute in pertinent part authorizes the Orphans' Court to remove a trustee "when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office." It is this statute which the Supreme Court of Pennsylvania referred to as "the presently applicable statute" (see Appendix A, *infra*, p. 47) in that it was held to permit the removal by the Orphans' Court of the City of Philadelphia's Board of Directors of City Trusts, the device which the court below concluded was the necessary, but sole and sufficient, prerequisite to the exclusion of Negro appellants from Girard College merely because of their race.

As the Supreme Court of Pennsylvania construed the Fiduciaries Act of April 18, 1949 to authorize the racially discriminatory order of the Orphans' Court, the validity of that authorizing statute is drawn directly into question.

From the point of view of appeal jurisdiction, the instant case is identical in posture with *McCollum v. Board of Education*, 333 U. S. 203. There appellees moved to dismiss on the ground, *inter alia*, that the validity of a state statute had not been drawn into question. This Court observed that appellees' contention "rests on the admitted fact that the challenged program of religious instruction was not expressly authorized by statute." This Court nevertheless held that its mandatory jurisdiction had been properly invoked inasmuch as:

> ". . . the State Supreme Court has sustained the validity of the program on the ground that the Illinois statutes granted the Board authority to establish such a program. This holding is sufficient to show that the validity of an Illinois statute was drawn in question within the meaning of 28 U.S.C., Sec. 344 (a)." 333 U. S. at p. 206.

What was made articulate in the *McCollum* case has been and remains the settled rule of this Court: [1] *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 289-290;

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[1] The question of mandatory appeal jurisdiction under Section 1257(2) of Title 28, the section here applicable, should be distinguished from the question posed by Sections 1253 and 2281 of Title 28, dealing with three-judge court proceedings and the right of direct appeal to this Court from a decision of a federal district court especially so constituted. In the three-judge court situation some of the cases have held that three-judge court proceedings are appropriate and the right of direct appeal to this Court exists only when the validity of the statute on its face is attacked. See, *e.g.*, *Ex Parte Bransford*, 310 U. S. 354, 361. In the cases involving appeal jurisdiction under Section 1257(2), however, all decisions of this Court are uniformly to the effect that an attack on the validity of the statute as applied brings the case within the mandatory appeal jurisdiction set forth in Section 1257(2) of Title 28. *McCollum v. Board of Education*, 333 U. S. 203. In addition, the more recent cases of this Court have held that even under Sections 1253 and 2281 this Court will allow an appeal where only the statute as applied is being attacked. See *e.g. McLauren v. Oklahoma*, 339 U. S. 637.

Hamilton v. University of California, 293 U. S. 245, 258; *Atchison, Topeka & S. F. R. Co. v. Public Utilities Commission*, 346 U. S. 346-348; See ROBERTSON & KURLAND, Jurisdiction of the Supreme Court of the United States (Wolfson & Kurland 3d, Ed. 1951, pp. 11, 21). The basis for the rule is, of course, that:

> "In cases where a state court has held a state statute applicable to a particular set of facts, against the specific contention that if applied to such facts the statute is invalid on federal grounds, the Supreme Court has exercised jurisdiction on appeal, the theory being that the state court has construed and applied the statute as though it had in specific terms been made applicable to the precise facts of the particular case, and has thus sustained its validity as so construed and applied." ROBERTSON & KURLAND, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (Wolfson & Kurland, 3rd Ed., 1951) pp. 23-24.

It is, of course, essential to support mandatory appeal jurisdiction in such circumstances that there be "an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws." *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U. S. 182, 185. In the instant case appellants Foust and Felder, as well as the City of Philadelphia and the Commonwealth of Pennsylvania, plainly pointed out in their Statements of Questions Involved and their briefs before the Supreme Court of Pennsylvania "that if the Fiduciaries Act of 1917 or any other statute, including the Fiduciaries Act of 1949, is interpreted as authorizing or requiring the City's removal (i.e., the removal of the Board of Directors of City Trusts acting on behalf of the City of Philadelphia) because it would have to admit Negroes to Girard College, serious problems are raised as to the statute's constitutionality. *Ill. ex rel., McCollum v. Board of Education*, 333 U. S. 203 (1948)." See *Brief for*

appellants Foust and Felder, In re Estate of Stephen Girard (Sup. Ct., Pa. Jan. Term, 1958), p. 26; *Brief for Commonwealth of Pennsylvania*, pp. 12, 24; *Brief for City of Philadelphia*, pp. 6-10, 32. Appellants had also challenged the validity of the Fiduciaries Act of 1949, as thus applied in the Statement of Questions Involved. See, for example, questions 2 and 3 of "*Statement of Questions Involved*," at page 1 of the brief for Foust and Felder. All appellants again raised this question in a joint petition for reargument (See Certified Record.) The instant case, therefore, falls clearly within this Court's jurisdiction on appeal under 28 U.S.C., Sec. 1257(2), in consonance with the principles enunciated above.

In the alternative, appellants submit that this case beyond question falls within this Court's jurisdiction on certiorari under 28 U.S.C., Sec. 1257(3); and pursuant to 28 U.S.C., Sec. 2103, this Court is urged to entertain the instant case on certiorari if it is felt that the case is not properly here on appeal. See *Pennsylvania v. Board of Directors of City Trusts*, 353 U. S. 230; *May v. Anderson*, 345 U. S. 528; *Union National Bank v. Lamb*, 337 U. S. 38, 39-40.

STATUTES INVOLVED

As already noted, the statute asserted to be invalid as applied is the Pennsylvania Fiduciaries Act of April 18, 1949, P. L. 512, Sec. 331(5), 20 PURD. STAT. Sec. 320.331, the relevant provisions of which are printed in Appendix B, *infra*, p. 91, *et seq.*

The other statutory provisions involved are the following Acts of the Pennsylvania Legislature, pertinent portions of which are printed in Appendix B, *infra*, p. 83, *et seq.*: Act of March 24, 1832, P. L. 176; Act of April 4, 1832, P. L. 275; Act of February 27, 1847, P. L. 178; Act of April 20, 1853, P. L. 624; Act of June 30, 1869, P. L.

1276; and Act of May 23, 1887, P. L. 168; and pertinent ordinances of the City of Philadelphia set forth in Appendix C, *infra*, p. 93, *et seq.* These statutes and ordinances comprise the vast legislative apparatus created by the Commonwealth of Pennsylvania and the City of Philadelphia implementing the will of Stephen Girard to enable the City to establish and maintain Girard College.

The constitutional provisions involved are Article VI, Clause 2 of the Constitution of the United States, and the Fourteenth Amendment.

QUESTIONS PRESENTED.

By his will, probated in 1831, Stephen Girard, "impressed with the importance of educating the poor, and of placing them by the early cultivation of their minds and the development of their moral principles, above the many temptations to which, through poverty and ignorance they are exposed," left most of his huge fortune to "the Mayor, Aldermen and citizens of Philadelphia" to build, establish and maintain Girard College. The will provides that if the City of Philadelphia defaults as trustee, the estate, save for certain properties, shall pass to the Commonwealth of Pennsylvania, and in default thereof, to the Government of the United States.[2] The City was enabled to accept the gift in accordance with its terms only by reason of state legislative enactments, all of which are still in effect. From 1832 to date the City of Philadelphia, first through its City Council and then through the Board of Directors of City Trusts, has acted as trustee and administered the entire estate, including Girard College which was opened in 1848.

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[2] Since the gift is to the "Mayor, Aldermen and citizens of Philadelphia" it is clear that upon the default of the City, the Commonwealth, and then the United States, as successor legatees would substitute as trustee of the entire Girard Estate, including the College.

This administration has been made possible only by a substantial number of implementing state statutes and municipal ordinances.

This litigation arises out of the refusal of the Board of Directors of City Trusts, and now the refusal of the Orphans' Court of Philadelphia, the so-called substituted trustees and the Supreme Court of Pennsylvania, to admit to Girard College Negro poor, male, orphans **who qualify in every respect for admission except that they are not white.**

On April 29, 1957, this Court held that the Board of Directors of City Trusts, the City agency created by the Pennsylvania Act of June 30, 1869, P. L. 1276, to administer Girard College, violated the rights of Negro appellants guaranteed them by the Fourteenth Amendment when it rejected their application for admission solely because of their race, even though Girard's will provided that the school was for "poor, male, white orphan children." *Pennsylvania v. Board of Directors of City Trusts*, 353 U. S. 230. This Court also held that the admission policies of the College were subject to this Court's ruling in *Brown v. Board of Education*, 347 U. S. 483. The Orphans' Court of Philadelphia county on remand, without hearing, notice or request of any party to the litigation, on its own motion, and in a proceeding whose only purpose was to attain an order requiring the admission of certain Negroes to Girard College, removed the City of Philadelphia as trustee of the entire Girard Estate and appointed a "private" group of thirteen trustees, six of whom (the majority of the old Board) were appointed upon the express condition and order that they resign from their governmental positions as members of the Board of Directors of City Trusts. The Orphans' Court then dismissed the petition of the Negro appellants for admission to Girard College solely on the grounds of their race. On appeal to the Supreme Court of Pennsylvania, counsel for the substituted trustees appeared although no petition to intervene had been filed. Counsel

for the Board of City Trusts entered his appearance as appellee, but failed to appear at argument to protest the Board's removal. The Supreme Court of Pennsylvania held that while there exists the general common law power, the jurisdiction to remove the public trustees was conferred upon the Orphans' Court of Philadelphia County by Section 331(5) of the Fiduciaries Act of April 18, 1949, P. L. 512, 20 Purd. Stat. §320.331, which provides that the court can remove a trustee "when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office." The court below affirmed the orders.

The questions presented are:

1. Whether Section 331(5) of the Fiduciaries Act of April 18, 1949, P. L. 512, 20 PURD. STAT. §320.331, violates the Fourteenth Amendment to the Constitution of the United States in so far as it authorizes or requires the judicial ouster of public trustees named in Girard's Will and authorized by state statute, when such judicial ouster is for the express and sole purpose of continuing the exclusion of Negro appellants from Girard College solely because of their race.

2. Whether the exercise of state judicial power to remove a trustee violates the Fourteenth Amendment when the expressed and sole purpose and effect of its exercise is to deprive Negro appellants of their previously adjudicated constitutional right to attend Girard College.

3. Whether a state, consistently with the Fourteenth Amendment, can convert a publicly operated school into a "private" school solely for the express purpose of denying Negroes their previously adjudicated constitutional right to attend the school prior to the conversion.

4. Whether, despite the removal of a municipal agency as trustee, Girard College is not still in constitutional contemplation a public institution whose admissions policies

are subject to the limitations of the Fourteenth Amendment:

(a) Because there remain in force so many other substantial forms of governmental supervision, subsidy and control; particularly, the requirement that the City of Philadelphia remain as guardian for all students at Girard College;

(b) Because the "new" trustees include the majority of the appointed members of the Board;

(c) Because the "new trustees" have been ordered to administer not only Girard College, but all the other trusts established for the public welfare by Girard's Will;

(d) Because Girard College cannot in any event escape the century of history in which governmental nurture of every kind has translated Stephen Girard's testamentary desires into a great public institution and increased the estate from $2,000,000 to $100,000,000.

5. Whether the action of the Pennsylvania courts on remand from this Court was inconsistent with the mandate of this Court.

6. Whether the appointment of "private" trustees not contemplated by the will does not impair the rights of the Government of the United States which was named ultimate successor trustee by Stephen Girard.

STATEMENT OF THE CASE

This appeal grows out of the fact that the Orphans' Court of Philadelphia County acting under §331(5) of the Pennsylvania Fiduciaries Act of April 18, 1949, P. L. 512, 20 Purd. Stat. §320.331, without notice, hearing, or argument or the request of any party to the litigation, removed the Philadelphia governmental body as trustee and administrator of Girard College solely because that public body was under a constitutional mandate to admit Negroes to Girard College as a result of this Court's holding that its decision in *Brown v. Board of Education*, 347 U. S. 483, was applicable to Girard College. So-called private trustees were appointed solely so that Negroes could be excluded from Girard College.

I. THE BACKGROUND

Stephen Girard died on December 28, 1831. The bulk of his vast estate was left to the City of Philadelphia for various municipal purposes, the most important of these being the establishment of Girard College. Article XXI of the Will named the City of Philadelphia trustee of $2,000,000 to establish and operate a school for "poor male, white orphan children" plus the residue of Girard's estate:

1. For the improvement and maintenance of Girard College; any excess to be used

2. For the provision of a better police force for the City;

3. To enable the City to improve City property and the general appearance of the City.

Girard bequeathed an additional $300,000 to the Commonwealth of Pennsylvania on the proviso that it enact within one year after his death the necessary enabling legislation to carry out the terms of his Will. (Article XXIII). Girard provided that if the City of Philadelphia

failed to establish Girard College or defaulted in the administration of the estate, the residue of his estate, except for the net income from Philadelphia real estate which was to be reserved for the College, was to pass to the Commonwealth, and in default thereof, of the United States (Art. XXIV).

Article XXI, §2 of the Will provides for the organization, staff and composition of the student body of the College. Before an orphan may be admitted to the College there must first be furnished to the City of Philadelphia a release by his guardian (*id.*, §5). Orphan boys born in the City of Philadelphia are given first priority among the applicants (*id.*, §6). The City of Philadelphia is given the power to bind out the orphans after their graduation from College to suitable occupations and manufactures (*id.*, §9). Further, this Article (1) declared that Girard left wide discretion to the City government of Philadelphia in relation to the management, organization and administration of Girard College and (2) expressed the belief that the extent of his gift will make the people of Philadelphia observe special care in the selection of their public officials.

To comply with Girard's requirements and to make the Commonwealth eligible for the $300,000, the Pennsylvania Legislature immediately enacted the Act of March 24, 1832, P. L. 176, and the Act of April 4, 1832, P. L. 275, which, in the words of the Orphans' Court in this case, "implements the will and authorizes the City to do everything necessary to accept the property and to serve as trustee in order to fulfill Girard's purposes." 4 D. & C. 2d 671, 677 (Orph. Ct., Phila., 1956); *Soohan v. Philadelphia*, 33 Pa. 9, 23 (1859).

The former Act directs the constituted authorities of Philadelphia to carry Girard's Will into effect, and incorporated into State law the provisions of Articles XXII, XXIII and XXIV of the Will which required such legislative implementation. The preamble to this Act declares:

". . . Now, for the purpose of enabling the Mayor, Aldermen and Citizens of Philadelphia, aforesaid, to effect the improvements contemplated by the said Testator, and to execute in all other respects the trusts created by his will, to enable the constituted authorities of the city of Philadelphia to carry which into effect, the said Stephen Girard has desired the legislature to enact the necessary laws."

Section 10 of this Act is a general grant of authority to the City to "do and execute all such acts and things whatsoever as may be necessary and convenient for the full and entire acceptance, execution and prosecution of any and all the devises and bequests, trusts and provisions contained in the said will . . .".

The Act of March 24, 1832, implemented the trust for the College as well as the trusts for the improvement of the City. Section 2 provides that no street or road shall be laid out or passed through the College property unless it is recommended by the trustees of the College. In this way the Legislature implemented the provision in Article XXI of the Will requiring that the entire College premises be enclosed with a solid ten feet high wall and guarded with iron on the top so as to prevent persons from getting over. This implementation by the Legislature in the Act of March 24, 1832, of Girard's Will in relation to the College was pointed out and emphasized by this Court in *Vidal v. Girard's Executors*, 2 How. 127, 190-191 (1844).

The second Act provides:

"The Select and Common Council of the City of Philadelphia, shall be and they are hereby authorized to provide by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard." (App. B, *infra*, p. 87).

Other legislation was enacted,[3] all of which has been recognized repeatedly by the courts of Pennsylvania as the foundation and support of what Girard wanted, or, in the words of the court below, "in aid of certain provisions of the Will." 386 Pa. at p. 554, Fn. 2. For example, Article XXI, par. 5 of Girard's Will stipulated that no student could be admitted to the College until the legislature enacted a statute giving to the Mayor of the City of Philadelphia the power and duty to prevent relatives from interfering with, or withdrawing, any orphans from the College. The Legislature so provided, just before the College first opened. Act of February 27, 1847, P. L. 178. This Act is "a special Act giving legislative sanction to Clause XXI, par. 5 of Girard's Will. It was passed to implement the Will." *Mangione, Minor*, 4 Fiduc. Rep. 517, 521 (Pa. 1954).

The same Act gave legislative sanction to paragraph 9 of Article XXI of Girard's Will, which required that students who reached 18 years of age were to be bound out by the City of Philadelphia to suitable occupations until they reached the age of 21. *Burns Estate*, 2 D. & C. 2d 579, 580 (Orph. Ct., Phila., 1955). It also gave authority to the City of Philadelphia to undertake this duty. Still another Act had to be passed to give the City authority and power to bind out the orphans as apprentices as required by the Will. Act of April 20, 1853, P. L. 624 (See App. B, *infra*, p. 90).

There were in addition a host of municipal ordinances, all stemming from the grant of power from the State, necessary to effectuate the Will. On March 21, 1833, for example, the Philadelphia City Council passed an ordinance providing for the construction of the school, naming it the Girard College for Orphans,[4] and requiring all building plans to be approved by Council. On July 14, 1836, an ordinance was adopted making provision for the purchase of

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[3] See App. B, *infra*, pp. 83-91.

[4] The City, not the Will, named the College.

books and paraphernalia. On January 28, 1841, Council ordained that all contracts entered into by the College had to be validated by Council. Committees were appointed by Council to handle the administration of the College.

The cornerstone of Girard College was laid on July 14, 1832. It was officially opened for student occupation on January 1, 1848. On November 9, 1848, Council appointed a visitation committee to visit the College once a month and report on its findings to Council. Indeed, between September 15, 1832, and December 18, 1869, the Council enacted more than forty different ordinances devoted exclusively to the Girard College. See App. C, *infra*, p. 93; dissenting opinion, App. A, *infra*, pp. 58, 74.

Until 1869 the College was under the direct charge of City Council and its various Committees. As a result of the increased duties required to manage the College and of dissatisfaction with the manner in which the College was managed by City Council, the management and direction of Girard College was transferred by the State Legislature to a Board of Directors of City Trusts of the City of Philadelphia, created by the Act of June 30, 1869, P. L. 1276, 53 Purd. Stat. §16365. This change was held by the Supreme Court of Pennsylvania to be merely a reallocation of city functions from one city agency to another city agency.[5] *Philadelphia v. Fox*, 64 Pa. 169 (1870). These directors "in the discharge of their duties, and within the scope of their powers aforesaid, shall be considered agents

[5] The fact that the Board was appointed and not elected, as was City Council, did not invalidate the Act, although Girard's Will expressed the belief that his fellow citizens would "observe and evince especial care" in the selection of their mayor and councilmen in view of the size of his estate which they would administer. Since the Legislature could repeal the City's charter, it could amend it by reallocating functions from elected to appointed officials, *Philadelphia v. Fox, supra*. In this way, the legislation superseded certain provisions of the will. In like manner, appellants urge that the Fourteenth Amendment supersedes the provision of the will restricting admission to "white" boys.

or officers of said city." (§6 of the Act of June 30, 1869, App. B, *infra*, p. 83. It is, moreover, the statutory duty of the directors "for and in the name of the said City, to do, perform, and discharge, all and singular, whatever acts and duties are or from time to time may become proper or necessary to be done by the said City in discharge of said trust. . . ."

The Mayor of the City and the President of City Council are designated by this statute as members of the Board. 53 Purd. Stat. §16365. The other twelve members are appointed by the judges of the Courts of Common Pleas of Philadelphia County. 53 Purd. Stat. §16366.[6] The City Controller, an elected official, is required by law to audit the accounts of the College each year (Philadelphia Home Rule Charter, Section 6-400(c)), and the Board is required by **the Will and by Statute** to report annually to the City Council and to the State Legislature. By statute it is also required to report to the Courts of Common Pleas of Philadelphia. 53 Purd. Stat. §16368. The City Treasurer is required by law to be the Treasurer of Girard College. 53 Purd. Stat. §16367.

The Board served without compensation, and the College enjoys a tax exemption equivalent to $555,700 per year (T. 474, 662).[7] When Girard College opened on January 1, 1848, all of the $2,000,000 had been expended. By the stewardship of the City of Philadelphia, however, the estate of $2,000,000 in 1832 has grown to $98,000,000 in 1955 with an annual income of $2,211,000 (T. 480).

The impressive array of State legislation and official action well supports this Court's statement, when this case

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[6] This method of appointment is the same as is used for the Board of Education which controls and operates the public school system in Philadelphia and the Board of Revision of Taxes which fixes the assessment for all real estate in Philadelphia for city and school taxes.

[7] "T" references are to the typewritten transcription.

was here before, that "the provisions of the Will were carried out by the state and city." 353 U. S. at p. 231.

Girard College is today, and has been since its inception, an institution of high educational standards, devoted to the education and training of orphan boys. Its physical "present capacity is 1,772 [students] with a potential of 2,012," *Mangiowe, Minor*, 4 Fiduc. R. 517, 520 (Pa. 1954), but at the time of hearing there were only 1,300 students in the school. Located in the heart of Philadelphia in what is now a substantially Negro area, this institution, administered by the City of Philadelphia for 127 years, excludes Negroes.

II. THE CURRENT CONTROVERSY

(How the Federal Questions are Presented)

In February, 1954, Negro appellants, Foust and Felder, applied for admission to Girard College. In March, 1954, the Board of Directors of City Trusts of the City of Philadelphia adopted a resolution rejecting them for admission. Each Negro appellant received a letter from the Secretary of the Board, on official stationery headed "The City of Philadelphia," setting forth the Board's resolution rejecting him. It was admitted by the Board and by all the parties that the Negro appellants meet all qualifications for admission, save race, and that the **refusal was based solely on the race of the Negro appellants.** *Girard Estate*, 4 D. & C. 2d 671, 672-3 (Phila. Orph. Ct. 1955);[8] *Pennsylvania v. Board of Directors of City Trusts, supra*, p. 231.

On September 24, 1954, the Negro appellants petitioned the Orphans' Court of Philadelphia County to order the Board of Directors of City Trusts to admit them, alleging,

[8] See also R. 69a. Under Girard's Will those who qualify are placed on an admission list and must be accepted for admission in order of application within certain priorities dictated by the Will based upon the place of birth of the orphan. *Soohan v. Philadelphia*, 33 Pa. 9, 28 (1859).

inter alia, that the Board's refusal violated the Fourteenth Amendment to the Federal Constitution (R. 62a, 72a). The Mayor of the City of Philadelphia and the Commission on Human Relations, a City agency, filed a separate petition joining in the request for relief sought by the Negro appellants, and also alleging that the Board's refusal violated the Fourteenth Amendment (R. 11a, 12a).* The Board of Directors of City Trusts filed an answer in which it admitted it was a City agency (R. 80-81a, 86a), but alleged that it could lawfully administer the College and implement the provision of the Girard Will limiting the admission to "poor white male orphans" by excluding Negroes.

Because of the provision of Girard's Will which would in certain circumstances give the property to the Commonwealth, and because of the Attorney General's authority and duty, *parens patriae*, to represent the beneficiaries of all charitable gifts in Pennsylvania, the Attorney General of the Commonwealth of Pennsylvania was informed of the proceedings at the suggestion of the hearing judge. See *Pruner's Estate*, 390 Pa. 529; *Garrison's Estate*, 391 Pa. 232. The Attorney General thereupon filed a petition in the Orphans' Court likewise alleging that the operation of Girard College on a racially restricted basis by the City, or by a private trustee because of the background of State aid and public administration violated the Fourteenth Amendment to the Federal Constitution as well as the public policy of Pennsylvania, and that the Negro appellants should be admitted (R. 116a-117a).

The hearing judge,[9] nevertheless, held that the City

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* "R" references are to the Appellants' Record in the Pennsylvania Supreme Court and certified to this Court when this case was last before it.

[9] The testimony before the hearing judge presented on behalf of appellants was devoted principally to demonstrating that a racially segregated school was injurious to the white student and not in harmony with the objectives of education in a democracy. The chief witness who testified on behalf of appellants were as follows: Isadore Chein (psychologist), Ira De A. Reid (sociologist), Alice V. Keliher (educator), Gilbert F. White (educator), E. Sculley Bradley (Professor of American Civilization and American Literature), and Maurice B. Fagan (specialist in infer-group relations).

could exclude Negroes without violating the Fourteenth Amendment. This decision was affirmed by the court *en banc* and by the Supreme Court of Pennsylvania. 386 Pa. 548, 127 A. 2d 287 (1956). This Court, however, on April 29, 1957, reversed, holding that it violated the rights of the Negro appellants guaranteed them by the Fourteenth Amendment for the Board of Directors of City Trusts, a governmental body, to refuse admission solely on the basis of race even it was acting pursuant to the terms of the Will. The cause was remanded to the Pennsylvania courts for "further proceedings not inconsistent with this opinion." 353 U. S. at p. 231. The authority cited was *Brown v. Board of Education*, 347 U. S. 483. When the case was returned to the Orphans' Court of Philadelphia County, that court, **without notice, without a hearing, and without the request of any party to the litigation, sua sponte,** removed the Board of City Trusts and appointed a thirteen man Board.[10] Paragraph 3 of the Orphans' Court order of October 4, 1957, provides that six of those appointed:

> ". . . shall resign as members of the Board of Directors of City Trusts of the City of Philadelphia, effective upon the discharge of the said Board as trustee of this estate, following confirmation of its final account to be filed pursuant to decree of the court entered September 11, 1957." (7 Fiduc. Rep. (Pa.) 609).

It is uncontroverted that these six constituted a majority of the living appointed members of the Board of

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[10] Had the Board of Directors of City Trusts petitioned the Court to be relieved of the trusteeship of Girard College in violation of the Act of 1869, there clearly would have been a "wilful and knowing failure" to carry out the terms of the trust, thus bringing into operation the forfeiture clause and the gift over to the Commonwealth, and in the event of further forfeiture, to the United States. Perhaps this is why the board presented no such request. The voluntary action of the Court obviated the need for such a petition.

Directors of City Trusts and included five of the eight members of the Executive Committee of that Board.

In the order the Orphans' Court denied, **solely on the basis of race,** the original petition of the Negro appellants for admission to Girard College.

The Negro appellants, the Commonwealth of Pennsylvania and the City of Philadelphia petitioned for reconsideration, again raising the federal constitutional questions raised throughout these proceedings and in addition asked that they have an opportunity to present evidence and oral argument, pointing out that in the absence thereof procedural due process was denied them as guaranteed by the Fourteenth Amendment.[11] The Orphans' Court denied these petitions. (7 Fiduc. Rep. (Pa.) 606-610).

A timely appeal was then taken to the Supreme Court of Pennsylvania and all appellants again raised the constitutional and federal questions which we now raise as questions numbered one through six. Particularly, the question of the constitutionality of the Fiduciaries Act of April 18, 1949, was specifically raised. For example, the brief filed on behalf of the Negro appellants included the following questions in the Statement of Questions involved:

> "2. Does §53 of the Pennsylvania Act of June 7, 1917, P. L. 519, or Art. IX, §921 of the Act of April 18, 1949, P. L. 512 require the Orphans' Court to remove the City of Philadelphia as Trustee solely because the City has a constitutional duty to admit Negroes to Girard College?" *(Not answered by the court below).*
>
> "3. If so construed do §§53 and 56 of the Pennsylvania Act of June 7, 1917, P. L. 519, or Art. IX, §921 and §901 of the Act of April 18, 1949, P. L. 512, violate the Fourteenth Amendment?" *(Not answered by the court below).*

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[11] See Petition for Reconsideration filed by appellants, Certified Record.

The Commonwealth and the City of Philadelphia raised similar questions. The Supreme Court of Pennsylvania specifically passed upon the applicability of the Act in question. It said:

> "The Fiduciaries Act of April 18, 1949, P. L. 512, §331(5), which is the presently applicable statute, confers exclusive power on the Orphans' Court to remove a trustee 'when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office. . . .'" (App. A, *infra.*, p. 47).

In addition, the appellants raised the question of State action and the effect of the Fourteenth Amendment on the attempt of the Orphans' Court to substitute trustees at this stage of the proceedings, as well as the effect and meaning of this Court's previous mandate. All of these questions were passed upon by the Supreme Court of Pennsylvania in its Opinion.

The same federal Constitutional issues were again raised in a timely Joint Petition for Reargument filed on February 3, 1958. This Petition was denied by the court below without opinion on February 12, 1958, whereupon the Negro appellants, the Commonwealth of Pennsylvania, the Mayor and the City of Philadelphia filed this Appeal to this Court.

The "new" trustees filed an appearance in the Supreme Court of Pennsylvania and defended the Orphans' Court order appointing them and excluding the Negro appellants from Girard College.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL AND ARE OF GREAT PUBLIC IMPORTANCE.

I.

The actions of the courts of Pennsylvania on remand are in direct conflict with *Shelley v. Kraemer*, 334 U. S. 1; *Barrows v. Jackson*, 346 U. S. 249, and *Pennsylvania v. Board of Directors of City Trusts*, 353 U. S. 230.

A.

The Supreme Court of Pennsylvania in its opinion assumed the constitutionality of the ouster of the City as trustee and the substitution of the "private" trustees. It then considered that any federal constitutional limitations applied to these new trustees so appointed would apply with equal validity to all trustees of charitable trusts, including those which had never had any nexus with a public or governmental body. The Court having discounted the history of public aid and administration of Girard College, and misunderstanding the opinion of this Court that the College was within the ambit of the Fourteenth Amendment, proceeded to adumbrate the possibilities of applying the restrictions of the Fourteenth Amendment to all charities, including those which had been privately administered from their inception. The court below said: "A will is without any force and effects whatsoever until it is probated," and that "the admission of a will to probate constitutes judicial action." See App. A, *infra*, p. 53. The court below further argued: "if all that is necessary to constitute a denial of equal protection of the laws in violation of the Fourteenth Amendment is State action and a racial or religious discrimination, then no private charity created by will can any longer dispense its benefits on the basis of race, creed or color according as its settlor has stipulated." See App. A., *infra*, p. 53.

But it is clear, and has been clearly stated throughout this entire litigation, that appellants find it unnecessary to make any contention of such breadth in the present case. No question of the right of a private citizen named in a will and acting as trustee pursuant thereto of an institution established, administered and maintained without the aid of public officials is involved in this litigation. Discussion of the advanced ground delineated *arguendo* by the Pennsylvania Supreme Court—that "no private charity created by will can any longer dispense its benefits on the basis of race, creed or color . . ." (App. A., *infra*, p. 53)—would serve only to obscure the instant problem. For it is appellants' view, confirmed by this Court's decision in *Pennsylvania v. Board of Directors of City Trusts*, *supra*, that the discriminatory bequest of Stephen Girard has never been "private" in character, and the more-than-a-century of history of Girard College cannot be obliterated by the magic of an Orphans' Court decree—a decree which, in any event, in no way affects a complex apparatus of continuing governmental controls. Moreover, if the Orphans' Court had the power retrospectively to revise the life of the great public institution which is Girard College—a process perhaps comparable with this Court's discharging the trustees of the Smithsonian Institution and declaring it "private"—exercise of such power to perpetuate what this Court has already found to be the unconstitutional exclusion of appellants Foust and Felder because they are Negroes would be precisely that "active intervention of the state courts, supported by the full panoply of state power," *Shelley v. Kraemer*, 334 U. S. at p. 19, which the Fourteenth Amendment forbids. *Railway Employees' Dept. A.F.L. v. Hanson*, 351 U. S. 225, 232 fn. 4. See also *Gandolfo v. Hartman*, 49 Fed. 181 (C. C. S. D., Calif., 1892); and *American Communications Ass'n, C.I.O. v. Douds*, 339 U. S. 382. Such actions, moreover, run afoul of decisions of the court holding that state action taken expressly for the purpose of removing all state connection with an activity

previously under the racial restrictions of the Fourteenth Amendment in order to avoid the proscriptions of that Amendment in and of itself violates the Amendment. See e.g., *Smith v. Allright*, 321 U. S. 649; *Terry v. Adams*, 345 U. S. 461; *Rice v. Elmore*, 165 F. 2d 387 (C. A. 4th, 1947).

Thus, this case, so viewed, obviates discussion of constitutional permissibility of judicial and executive supervision and enforcement of conventional private trusts of a discriminatory nature. Such questions—which, nonetheless, are plainly federal questions of gravest import [12]—can arise only if this Court accepts the rationale of the Pennsylvania courts that a *sua sponte* court order substituting "private" trustees (six of whom, it is to be recalled, are members of the Board of Directors of City Trusts) for the municipal trustee, entered after this Court's decision, has suddenly transformed Girard College into a genuinely private trust.

B.

The court below regarded *Shelley v. Kraemer*, and *Barrows v. Jackson* as inapplicable to the present case because in those cases, "The elements which brought the 'equal protection' clause of the Fourteenth Amendment into play . . . consisted of State action for the enforcement of a discrimination based on race or color in impairment of a constitutionally protected right of an individual to which he, along with all other members of the community, is entitled as a matter of public law. It is plain enough from the words of the Fourteenth Amendment that it is 'laws', and not claims under some private testament, whereof the Amendment guarantees everyone 'equal protection'. Manifestly, therefore, an element essential to the invocation of the 'equal protection' clause of the Fourteenth

[12] Comparable questions on at least two occasions have caused this Court to issue its writ of certiorari only to find that the question was not properly in the case. *Rice v. Sioux City Cemetery*, 348 U. S. 80, *grant of certiorari explained* in 349 U. S. 70, 72-74, and *Black v. Cutter Laboratory*, 351 U. S. 292.

Amendment is absent in this case." App. A., *infra*, p. 52. "Not coming within the qualifications required by Stephen Girard's will for admission to his Orphanage, the present applicants have no right to be beneficiaries thereof in defiance of the settlor's plainly expressed and legally valid testamentary provisions. Neither *Shelley v. Kraemer* nor *Barrows v. Jackson, supra*, teaches otherwise." [13] App. A., *infra*, pp. 49-50.

The difficulty with the position of the court below is that this Court has already, in this very litigation, held that appellants Foust and Felder have a constitutional right not to be excluded from Girard College on the basis of the racial qualification set by Stephen Girard. In continuing to insist that Foust and Felder are out of court because they do not come "within the qualifications required by Stephen Girard's will for admission to his orphanage," the State Supreme Court has failed to recognize that **the adoption of the Fourteenth Amendment imposed upon this publicly administered trust constitutional standards of nondiscrimination in admission which supersede the "white" provision of the will.** It is precisely this which is the "law of the case" under *Pennsylvania v. Board of Directors of City Trusts, supra.*[14]

What appellants here attack is the state action to alter the *status quo* so that a constitutional right which the Negro

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[13] The analysis suggested by the Supreme Court of Pennsylvania would require a reversal of *Shelley v. Kraemer, supra.* For under Missouri Law, as a matter of Missouri common law, the deed to the Negro buyer was a nullity. It was only because the Fourteenth Amendment prohibited the application of the Missouri common law rule that the Negro buyer initially and ultimately obtained the constitutional right to occupy the land in question.

[14] The Pennsylvania Courts, moreover, have specifically recognized that a white boy can force Girard College to admit him, if he is qualified. *Soohan v. Philadelphia*, 33 Pa. 9 (1859) and, of course, the Attorney General clearly has standing to force a public charity to adopt and carry out admission policies which do not violate federal constitutional law.

appellants have under the *status quo* is not destroyed by the court inspired transfer.

To treat the present appeal as a new problem, as if it dealt with eligibility for admission to an institution, always private, is to blink the decisive fact that it was the Orphans' Court's own order, substituting new trustees, which created the wall of "privacy" now said to insulate Girard College from the Fourteenth Amendment. This case, therefore, is very much like *Railway Employes' Dept. A. F. L. v. Hanson*, 351 U. S. 225, where this Court held that a union shop agreement which would have contravened state law but for superseding federal legislation was subject to federal constitutional limitations, notwithstanding that the agreement affects so-called "private" rights. "If private rights are being invaded, it is by force of an agreement made pursuant to federal law, which expressly declares that state law is superseded. . . . In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed. . . . The enactment of the federal statute . . . is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." 351 U. S. at p. 232.

So, in the instant case, exclusion of Foust and Felder was declared by this Court one year ago to offend the Constitution. To overcome this federal mandate, the Orphans' Court, ignoring the obligation imposed by Article VI, clause 2 of the Constitution, undertook to alter the structure of Girard College in such a way as to facilitate further racial exclusion, i.e., to legitimatize racial discrimination which had hitherto been unlawful. Recalling that a statute is involved—the challenged Fiduciaries Act of 1949—the appositeness of the *Hanson case, supra*, becomes complete. To paraphrase its language:

> "If private rights are being invaded, it is by force of an agreement made pursuant to [state] law which . . . declares that [federal] law is superseded . . .

> In other words, the [state] statute is the source of the power and authority by which any private rights are lost or sacrificed. . . . The enactment of the [state] statute . . . is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." 351 U. S. at 232.

C.

In the instant case the vice of the challenged state action—whether its source be viewed as the order of the Orphans' Court or the underlying statutory authority embodied in the Fiduciaries Act of 1949—is even greater than in *Hanson*. There the governmental action was permissive: private agreements might or might not follow, depending on the unfettered will of private bargainers. But here the single necessary and intended result of the challenged state action was to perpetuate the Negro appellants' exclusion from Girard College. Indeed, the Orphans' Court completed the entire process itself by ordering the substitution of new trustees and ordering the final and permanent exclusion of Foust and Felder. The state Supreme Court's denial that the Orphans' Court's purpose was to exclude Negroes from Girard College is unavailing in the face of the patent facts. The only reason for attempting to rewrite the will of Girard, by altering the relationship of Girard College, "the Mayor, Aldermen and citizens of Philadelphia", the Commonwealth of Pennsylvania and the United States was to bring about a situation in which the continued exclusion of Foust and Felder because they are Negroes would be, in the judgment of the state courts, permissible as a matter of federal law. State action to such an end is barred by the Fourteenth Amendment. *Cf. Terry v. Adams*, 345 U. S. 461; *Rice v. Elmore*, 165 F. 2d 387 (C. A. 4th, 1947), *cert. denied*, 333 U. S. 875.

This conclusion may be tested by supposing that the instant litigation had arisen in rather different fashion.

If the Board of Directors of City Trusts had in the first instance *admitted* Foust and Felder, and the Orphans' Court, on its own motion or otherwise, had, in order to sustain its supervision of the Girard will, discharged the Board of Directors of City Trusts, substituted "private" trustees, and ordered the expulsion of Foust and Felder because they were Negroes, it is hardly to be supposed that such judicial action could be squared with the Fourteenth Amendment cf. *Barrows v. Jackson, supra.* Appellants submit, however, that the supposed situation and the actual one are from a constitutional point of view indistinguishable. In the case at bar, the determination that Foust and Felder were entitled not to be excluded on the basis of race was achieved not by a voluntary act on the part of the public trustee, but by the mandate of the Constitution as declared by this Court. Now, on **its own motion**, the Orphans' Court seeks to frustrate the rights authoritatively declared by this Court.

D.

In point of trust law, what the Orphans' Court sought to do was to transfer title to Girard College from "the Mayor, Alderman and citizens of Philadelphia" [15] to so-

[15] Such a gift clearly was a gift to the public and the estate became public property, albeit impressed with a trust. *Pruner's Estate*, 390 Pa. 529 (1957); See Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 MICH. L. REV. 633. For, a gift to the City in trust for a charitable purpose is no different from a gift in fee for the same purpose. See Shanks, *"State Action" and the Girard Estate Case*, 105 U. OF P. L. REV. 213, 226 (1956), *Craig's Estate*, 356 Pa. 564, 52 A. 2d 650 (1947). The City thus became trustee for itself. The order of the Orphans' Court divests the City of a valuable property—approximately $100 million—and transfers it to a group of private individuals. Without notice or hearing and over the protests of the City, the rights of the City as trustee and beneficiary have been abrogated by this order. The constitutional rights of citizens cannot turn upon state law rules as to property ownership. "Title to property as defined by state law controls property relations: it cannot control issues of civil liberties." *Marsh v. Alabama*, 326 U. S. 501, at p. 511.

called "private" trustees. Simultaneously, so the Orphans' Court also believed, the beneficial interest which pursuant to the Fourteenth Amendment ran to all poor male orphans without racial differentiation, *Pennsylvania v. Board of Directors of City Trusts*, *supra*, would be restricted to the "white" orphans for whom it was reserved until 1868, the year of the Fourteenth Amendment's adoption.

For the Commonwealth of Pennsylvania or the City of Philadelphia to take property beneficially belonging to the general citizenry of Philadelphia and transfer interests in it in such a fashion that the beneficial use accrues only to white members of the community is unconstitutional. "It is not conceivable that a city can provide the ways and means for a private individual to discriminate against its own citizens." *Lawrence v. Hancock*, 76 F. Supp. 1004, 1009. It is clear that "the power to sell or lease must not include the power to discriminate against members of any race." *Tate v. Department of Conservation and Development*, 133 F. Supp. 53, 61 *affirmed*, 231 F. 2d 615. It would seem even plainer that a gratuitous transfer of nearly $100,000,000 worth of municipal property to "private" persons directed to administer the property on a discriminatory basis cannot be squared with the decisions of this Court. *Muir v. Louisville Park Theatrical Assn.*, 347 U. S. 971, *vacating* 202 F. 2d 275; *Dawson v. Mayor of Baltimore*, 350 U. S. 877; *Holmes v. City of Atlanta*, 350 U. S. 879.

In *City of Greensboro v. Simkins*, 246 F. 2d 425, the Court of Appeals for the Fourth Circuit sustained an injunction against exclusion of Negroes from a municipal golf course leased to and operated by private persons; the court observed:

> ". . . As pointed out in the Tate case, supra, the right of citizens to use public property without discrimination on the ground of race may not be abridged by the mere leasing of the property. The city may . . . part with ownership of the property by bona fide

> sale; and the court . . . will doubtless approve other dispositions if they will not result in unlawful discrimination against citizens on the ground of race or color. . . ."

So here only a bona fide disposition of Girard College which is otherwise conformable with the Girard will and which does not on a racial basis curtail the vested beneficial interest in the property, or in any consideration received therefor, of any of the "citizens of Philadelphia," would be a disposition consonant with the Fourteenth Amendment.[16] And, it should be added, even such a disposition cannot arbitrarily cut off the proprietary rights of the United States as ultimate successor trustee and legatee, for these rights, as the Orphans' Court had made plain in this very litigation (4 D. & C. 2d 701, 702 (1955)) are recognized by Pennsylvania law and cannot therefore be summarily extinguished. *Cf. United States v. Burnison*, 339 U. S. 87. And whether the federal government's rights as trustee can be by-passed in favor of persons not named in the will is truly a question of federal law. *Cf. Clearfield Trust Co. v. United States*, 318 U. S. 363; *American Houses, Inc. v. Schneider*, 211 F. 2d 881 (3rd Cir., 1954). Clearly federal law would not permit the exercise of federal judicial power to allow Girard College to continue as a racially segregated school. *Cf. Hurd v. Hodge*, 334 U. S. 24.

II.

The administration of the college remains infused with "State action" despite the removal of the City as trustee and substitution of "private" trustees.

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[16] The City may not dispose of property dedicated for public purposes even for fair value since the rights of the citizens as to the beneficial use of such property cannot be destroyed. 3 Dillon, Municipal Corporations (5th Ed.), §1102: "A Municipal Corporation has no implied or incidental authority to alien or dispose of for its own benefit, property dedicated to, or held by, it in trust for public uses. See also *Hoffman v. Pittsburgh*, 365 Pa. 386 (1950); *Comm. v. Rush*, 14 Pa. 186 (1850).

A.

Girard College is now an educational institution inused with State action in the fullest sense, requiring the application of the Fourteenth Amendment thereto regardless of who now becomes the trustee. Girard's intention and the legislative implementation and the City management of the Estate for over 127 years and of the school for 107 years, increasing the fund from $2,000,000 to $100,000,000 and building a good educational institution serving over 1,300 boys at a time, have impressed upon the College a governmental and public character which now cannot be eradicated by decree. Judicial substitution of trustees cannot alter the effects of more than a century of history. The numerous statutes enacted to authorize and direct the City of Philadelphia to carry out the Trust, the numerous statutes enacted to change the law of Pennsylvania so certain provisions of Girard's will with respect to guardianship and indentureship could be carried out, its tax exempt status, and the 127 years of City administration of the will taken cumulatively constitute the type of State aid and help which makes the resultant institution subject to the prohibitions of the Fourteenth Amendment. *Cf. Kerr v. Enoch Pratt Free Library*, 149 F. 2d 212 (4th Cir., 1944), *cert. denied*, 326 U. S. 721; *Marsh v. Alabama*, 326 U. S. 501; *Public Utilities Commission for the District of Columbia v. Pollak*, 343 U. S. 451; *Steele v. Louisville and Nashville R. R. Co.*, 323 U. S. 192; *Brotherhood of Railway Trainmen v. Howard*, 343 U. S. 768.

As set forth in the Statement of Facts, the Supreme Court and the Orphans' Court of Pennsylvania have repeatedly referred to the statutes enacted with respect to Girard College as special acts "giving legislative sanction" to certain provisions of the Will. *Supra*, pp. 12-18. The substitution of the "private" Board of Trustees had no effect upon the statutory duty of the Mayor of the City of Philadelphia and the Board of City Trusts to remain as guardian

of all Girard College students and also to supervise the indenturing of the students. Likewise, the Council of the City of Philadelphia and the Legislature of Pennsylvania will still be under the statutory duty to visit the College and accept annual accounts. In addition the City Treasurer and the City Controller are still under statutory duties to keep the funds of the College and to audit the accounts annually. No action of the state courts can relieve these public officials of duties conferred upon them by state statutes still on the books. The Orphans' Court has no jurisdiction over these officials. They are not parties to the action.

B.

Significantly, the "new" Board itself is a creature of the state and of state law. In addition, the order appointing the new Board specifically requires six members of the old Board to resign from their governmental position on the City Board of Directors to accept the duties of the new Board.

It is significant that in selecting six of the present twelve appointed members of the Board of Directors of City Trusts as substituted individual "private" trustees, the Orphans' Court added one additional dimension to the state action already present. These six former members of the Board included its President and two of its three Vice Presidents. In addition, they constitute a majority of the appointed members of the Board. They now constitute almost one-half of the membership of the new "private" trustee group. Hence, if the decrees are enforced they will have the effect not only of transferring public property and governmental functions to private persons, but also of requiring or directing that those City officers now performing these functions resign their governmental offices effective upon discharge of the Board as trustee, by the Orphans' Court, in order to perform the identical functions as private persons. This, we submit, is state action in plainest violation of the Fourteenth Amendment. *Terry v. Adams*,

345 U. S. 461 (1953); *Rice v. Elmore*, 165 F. 2d 387 (C. A. 4th 1947), *cert. denied*, 333 U. S. 875 (1948); *Lawrence v. Hancock*, *supra*.

Clearly, the Orphans' Court decrees do no more than to change the labels of the active public administrators of Girard College and now call them "private" administrators. Such a decree is, in substance, a violation of the mandate of the Supreme Court of the United States.

C.

Whether the gift for the College and the competency of the City to act as trustee may have been upheld even in the absence of the implementing legislation is an academic question of no real pertinence here. The critical fact is that there remains active City participation in the administration of Girard College pursuant to state statutes dealing with the guardianship of the students. Hence, "state action" is still vital to the operation of the school, despite the substitution of "private" trustees for the City.

The Act of February 27, 1847, P. L. 178, and the supplementing Act of April 20, 1853, P. L. 624, dramatically illustrate how the sovereign power of the state is invoked to bring to fruition the private testamentary scheme. These acts are special statutes enacted to implement the Will. Indeed, the Act of February 27, 1847, is entitled "An Act Relative to the Girard College for Orphans" (App. B, *infra*, p. 87. By this statute, the Pennsylvania law relating to the indenturing of orphan children was altered specifically and solely for Girard College. The Act changed the ages for indenturing to comply with those fixed in Girard's Will. It provides for the expiration of the indenture if before attaining the age of fourteen, the child is expelled from the College because of misconduct. In fact, there are several provisions requiring action to be taken "according to the Will [of Stephen Girard]," thus incorporating by reference provisions of the Will into the statute. The most intimate rights of guardianship and indenture of minors are pre-

scribed by state statute only for the students at Girard College and in terms complying with the requirements of the Will.

While it may be asserted that "Girard did not stipulate that any such legislation be enacted", he provided this in effect in Article XXI, paragraph 5, of his Will which prohibits the admission of any orphan until such a law came into existence (R. 36a-37a). Accordingly, but for state law, the College cannot properly be administered today. And even if operated by "private" trustees, the school's life lines are so dependent on "state action" that to deny admission solely on the basis of race or color violates the Fourteenth Amendment.

Moreover, the fact that education of children—"perhaps the most important function of state and local governments," *Brown v. Board of Education, supra*, at p. 493—is involved makes the state action even more apparent. *Cf. Terry v. Adams, supra;* see Note, *City's Operation of Schools under Discriminatory Will Does Not Violate the Fourteenth Amendement*, 56 COLUM. L. REV. 285, 287 (1956); Fairman, *Mr. Justice Bradley*, at p. 91, in Dunham and Kurland, MR. JUSTICE (1956).

III

Appellants submit that the errors committed by the Pennsylvania courts have their genesis in their misinterpretation of this Court's mandate which remanded the causes to the Pennsylvania courts "for further proceedings not inconsistent with this opinion." The Pennsylvania courts read this provision as an instruction that the courts did not have to admit the Negro appellants to Girard College.[17] The basis for the interpretation was *Sweatt v. Painter*, 339 U. S. 29, where "immediately preceding, and as a part of the order of reversal [of this Court], there is the specific ruling by the Court that 'the Fourteenth

[17] Mr. Justice Musmanno in his dissents from the remand order and the decision from which this appeal is taken construed this Court's mandate to require immediate admission of the Negro Appellants to Girard College.

Amendment requires that petitioner be admitted to the University of Texas Law School.' The mandate in the instant case contains no such directive." See App. A, *infra*, p. 41. This mandate, however, should be compared with those in which questions of fact or state law were explicitly left open for the determination of the state court. *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435. The Pennsylvania Court's interpretations of this Court's mandate ignore completely the cases in which there was only the general direction and yet the Negro appellant was admitted to the previously all white institution. See *e.g., Frazier v. Board of Trustees of University of North Carolina*, 134 F. Supp. 589 (M.D.N.C. 1955) aff'd. 350 U. S. 979; *Sipuel v. Board of Regents*, 332 U. S. 631. Only this Court has the power to supervise and to give an authoritative interpretation of the meaning of its mandates. See *Evasion of Supreme Court Mandates by State Courts*, 56 Yale L J 574; *Allegheny Corp. v. Breswick*, ——U. S. ——, 2 L. Ed. 2d 374 (1958). Here the admission of Negro appellants was the only question before the court. No party to the litigation had requested or ever suggested that the City of Philadelphia should be ousted as trustee—especially of the entire Estate.

If the interpretation of the Supreme Court of Pennsylvania is left standing, it would mean that this Court's decision of April 27, 1957 was purely an advisory opinion not adjudicating the rights of the Negro appellants despite this Court's clear holdings ever since *Hayburn's Case*, 2 U. S. 409 (1792), that it would not render advisory opinions.

IV

The questions presented by the instant case and by the decision of the court below are substantial and important. That decision is not an isolated decision of an inferior court, which, though in error, does not present that recurring type of situation which this Court will review. There are numerous public institutions publicly administered which may seek to be metamorphosed into private institutions to evade the restrictions of the Fourteenth Amend-

ment. The action of the Pennsylvania courts, albeit unwitting, provides a blueprint for the evasion of the decrees of this Court.

This Court has always been solicitous of individual rights, and particularly so in areas of racial discrimination and segregation.

The litigation involves an institution which ranks fifth in total endowment behind Harvard, Yale, Columbia, and the University of Texas. 66 YALE L. J. 979, 984 Fn. 19. And the legal issues raised are as important and as far reaching as those disposed of in this Court's opinion in the earlier stage of this litigation.

CONCLUSION

The questions herein presented are substantial and of public importance.

Respectfully submitted,

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April 23, 1958

APPENDIXES

Appendix A

OPINIONS AND JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA

In re: GIRARD COLLEGE TRUSTEESHIP

Nos. 109 to 121 inclusive, January Term, 1958

Reported at 391 Pa. 434

OPINION BY MR. CHIEF JUSTICE JONES, January 24, 1958:

When this matter was here before, we affirmed the action of the Orphans' Court of Philadelphia County denying admission to Girard College to William Ashe Foust and Robert Felder, poor male Negro orphans, for the reason that the will of Stephen Girard, the founder and endower of the College, expressly restricts admission to "poor male white orphans": see *Girard Will Case*, 386 Pa. 548, 551, 127 A. 2d 287. Although the institution is referred to as a College, the testator himself aptly termed it an "Orphan Establishment" in one of two codicils which, with the decedent's will, were probated shortly after his death in 1831.

The will nominated and appointed as trustee of the charity the Mayor, Aldermen and Citizens of Philadelphia, the then corporate title of the City, which duly entered upon its trust duties. But, for years, the College has been administered by the Board of Directors of City Trusts of Philadelphia, a body statutorily created by the Act of June 30, 1869, P. L. 1276. The Act empowered the Board to accept and execute charitable trusts bequeathed to the City of Philadelphia, as trustee, whereof a large number, following Girard's lead, had come into existence: see *Philadel-*

phia v. Fox, 64 Pa. 169, 172 et seq. For the proper administration of the trusts committed to it, the Board of City Trusts is accountable to the Orphans' Court of Philadelphia County: *Wilson v. Board of Directors of City Trusts*, 324 Pa. 545, 188 A. 588. That court, deeming the Board of City Trusts to be like any other trustee which is a creature of statute and authorized to accept and administer private trusts, held by its decrees, which we affirmed, that the Board of City Trusts was bound to abide faithfully by the restrictions which Girard's will imposes on admissions to the College.

However, the Supreme Court of the United States reversed our judgment of affirmance and remanded the cause for further proceedings not inconsistent with that Court's opinion which held that the Board of City Trusts is an agency of the State of Pennsylvania and that, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the College because they were Negroes was discrimination by the State which is forbidden by the Fourteenth Amendment, citing *Brown v. Board of Education*, 347 U. S. 483: see *Pennsylvania v. Board of Trusts*, 353 U. S. 230.

In obedience to the Supreme Court's mandate, we vacated the decrees of the Orphans' Court and remanded the cause to that court "for further proceedings not inconsistent with the opinion of the Supreme Court of the United States as set forth in its said mandate," a true and correct copy thereof being appended to our order of remand.

The Orphans' Court, construing the Supreme Court's opinion to mean no more than that the Board of City Trusts was constitutionally incapable of administering Girard College in accordance with the testamentary requirements of its founder, entered decrees removing the Board as trustee of Girard College and substituting for that purpose thirteen private citizens none of whom holds any public office or otherwise exercises any governmental power under the Commonwealth of Pennsylvania or any of its political or municipal subdivisions. It is these decrees

which are now before us for review on the separate appeals of Foust, Felder, the Commonwealth of Pennsylvania and the City of Philadelphia (the State and City having voluntarily become parties to the proceedings). Simply stated, the question for decision is whether the action of the Orphans' Court is inconsistent with the opinion of the Supreme Court of the United States.

It is the appellants' contention that the Supreme Court's mandate required the Orphans' Court to order the Board of City Trusts to admit Foust and Felder to Girard College forthwith. With that, we cannot agree. Had the Supreme Court so intended, it would have said so just as it did in *Sweatt v. Painter*, 339 U. S. 629 (1950), where there was involved a state-supported University's denial of admission to a Negro because of his race. The order of reversal in the *Sweatt* case also included a remand of the cause for further proceedings not inconsistent with the Supreme Court's opinion but, immediately preceding, and as a part of the order of reversal, there is the specific ruling by the Court that "the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School." The mandate in the instant case contains no such directive.

The appellants' effort to make a "segregation" issue out of Stephen Girard's private charity, merely because of the inability of the Board of City Trusts, as trustee, to comply with the donor's express directions, serves only to confuse and obscure the real issue involved as to the right of a private individual to bequeath his property for a lawful charitable use and have his testamentary disposition judicially respected and enforced. In *Holdship v. Patterson*, 7 Watts 547, 551 (1838), Mr. Chief Justice Gibson pertinently stated that a testamentary benefactor "has an individual right of property in the execution of the trust, and to deprive him of it would be a fraud on his generosity. To appropriate a gift to a purpose *or person* not intended, would be an evasion of the donor's private dominion" (Emphasis supplied). As lately as *Borsch Estate*, 362 Pa. 581,

586, 67 A. 2d 119 (1949), we recognized, as constitutionally safeguarded, the right of a benefactor to have enforced the limitations and restrictions affixed to his testamentary gift. The exercise of that right is but one of the manifestations of the right of private property which is fundamental to our social, economic and political order and whose preservation unimpaired is as vital to our Negro citizens as it is to their white brethren.

As we read the Supreme Court's opinion, what it holds, and all that it was presumably intended to hold, in view of what was then before the Court, is that the Board of City Trusts, being a State agency, is incapable of administering Girard College in strict compliance with the founder's prescribed racial restriction on admissions without being guilty of a violation of the Fourteenth Amendment. However, the Supreme Court did not say that there is any Constitutional or other legal barrier to the removal of the Board of City Trusts as trustee of Girard College in order that the Orphanage can be administered in accordance with all of the testator's express directions including the qualifications for admission to the student body. On the other hand, there is high authority for such procedure where a trustee is either unable or fails or refuses to administer a trust in accordance with the lawful directions of the settlor.

In *Vidal et al. v. Girard's Executors*, 43 U. S. (2 Howard) 126, 188 (1844), which was concerned with an attempt by Stephen Girard's heirs to nullify the Girard Trust, one the grounds of attack was that the City of Philadelphia, a municipal corporation, was legally incapable of executing the trust. In rejecting this contention Mr. Justice STORY, speaking for the Supreme Court, said: "It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court,

possessing equity jurisdiction, to enforce and perfect the objects of the trust."

Subsequent to the "Consolidation Act" of February 2, 1854, P. L. 21, which enlarged the physical area of the City of Philadelphia by incorporating therein outlying territory, Girard's heirs renewed their attack on the trust. The case again went to the Supreme Court of the United States where it was argued that the "Consolidation Act" had "either dissolved or destroyed the identity of the original corporation [City of Philadelphia], and it is consequently unable any longer to administer the trust." Mr. Justice GRIER, who delivered the opinion of the Court, said, "Now, if this were true [that the City could no longer act as trustee of the Girard Estate], the only consequence would be, not that the charities or trust should fail, but that the chancellor should substitute another trustee": *Girard v. Philadelphia*, 74 U. S. (7 Wall.) 1, 12, 13 (1868).

The inability of the Board of City Trusts to apply constitutionally the racial criterion prescribed by the testator for admissions to Girard College affects *the trustee* and *not the trust*. As the opinion for the Orphans' Court so well states, "It is a universally accepted rule of law that the disqualification or incompetency of a trustee shall not be permitted to defeat the purposes of a charitable trust, nor to impeach its validity, nor to derogate from its enforcement—the trustee must be fitted to the trust and not the trust to the trustee." It necessarily followed, therefore, that the course to be pursued in order that the trust may continue to be fully effectuated in accordance with the benefactor's intent was not to obliterate by judicial fiat an express term of his will which, as a private individual, he had a legal right to impose (see *City of Philadelphia v. Girard's Heirs*, 45 Pa. 9, 26) but for the court, which has jurisdiction of the trust and its fiduciary, to appoint substitute trustees capable of carrying out the testator's lawful prescriptions. And, that is precisely what the Orphans' Court has done.

The appellants argue, however, that "As a result of legislative implementation and City management, Gir-

ard College has taken on a "public character" and must, therefore, be administered as a public charity by a public body suject to the inhibitions of the Fourteenth Amendment. We are unable to perceive the slightest basis for the contention either in Girard's will or in legislation passed in relation to the Girard Estate.

The testator's primary and dominant object was to found a private charitable institution for the training, education and maintenance of poor male what orphans. Thus, his will expressly declares: ". . . I am *particularly desirous* to provide for such a number of *poor male white orphan children*, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of *public* funds . . . ." He directed that certain physical things be done on the land he devised for the College "so that the establishment [i.e., the College] may be rendered secure and *private*." And, upon devoting, secondarily, specified income from the trust fund to the promotion of the prosperity of the City and the health and comfort of its inhabitants, the testator directed that such income should be applied yearly for the indicated purposes but only "after providing for the College as hereinbefore directed as my *primary object*" (all emphasis above supplied).

It is not possible to read Girard's will without being deeply impressed with the fact that it was *the College, as a private charity*, and *not the trusteeship of the City*, that was the primary object of the donor's testamentary scheme. Of course, a trustee was a necessary and unavoidable incident of the trust, and the testator, desiring the continuity of the institution, availed himself of the services of the only existing local corporate body capable of administering the trust in perpetuity. What the will so clearly reveals as to the intended paramountcy of the private charity has long since been judicially recognized. In *Girard v.. Philadelphia*, supra, the Supreme Court of the United States spoke of the College, just as the testator had done, as the "primary

object" of the three objects to which the income of the whole residuary estate was to be devoted. Cf. also *Vidal et al. v. Girard's Executors*, supra. And, in *City of Philadelphia v. Girard's Heirs*, supra, this court, in construing the Girard will, declared that its dispositive portion was "a devise of all the residue of his real and personal estate to the city of Philadelphia, an existing corporation, in trust, as his 'primary object', to construct, furnish, constitute, and maintain the institution now known as the Girard College . . . ."

The private character of the trust and the privacy of the Orphanage which the trust was established to maintain and administer were aptly described in *Girard Will Case*, supra, as follows: "All provisions of the will show that it was not intended to be a public school; indeed, it is not merely a school at all but what Girard himself called a codicil to his will, an 'Orphan Establishment,' a home where the fatherless boys eat, sleep, study and live together, enjoying the testator's bounty which provides for them not only an education but also lodging, board, clothing and all the necessities of life. . . . Girard College is a comparatively large institution, but no different legal principles apply to it for that reason than to the smallest of private schools. It is erected on land owned by Girard and the buildings were constructed with his own funds. . . . The college has been supported and maintained for now over a century by Girard's estate; not a penny of State or city money has ever gone into it; no taxpayer has ever been called upon to contribute to it; true, it is exempt from local taxation, but so are all other charities even though restricted as to their beneficiaries and managed by private trustees.".

The statutes and ordinances which the appellants urge as having made a public trust of Girard College did not so operate. Certain it is that no additional legislation was required to clothe the City with the fiduciary powers necessary for the administration of Girard College. The Supreme Court said in this very conection in *Vidal et al. v. Girard's Executors*, supra: "We think, then, that the charter of the

city does invest the corporation with powers and rights to take property upon trust for charitable purposes, which are not otherwise obnoxious to legal animadversion; and, therefore, the objection that it is incompetent to take or administer a trust is unfounded in principle or authority, under the law of Pennsylvania." The legislative enactments which the appellants stress were designed in large part to able the Commonwealth and the City to receive and use for their governmental purposes pecuniary legacies bequeathed directly to them by Girard's will. The rest of the legislative enactments were purely administrative measures neither envisioned nor required by Girard's will. And, the same can be said for the ordinances which the appellants cite.

What Mr. Chief Justice LOWRIE so clearly recognized for this court in *Philadelphia v. Girard's Heirs*, supra, is peculiarly apposite here: "In all gifts for charitable uses the law makes a very clear distinction between those parts of the writing conveying them, which declares the gift and its purposes, and those which direct the mode of its administration. And this distinction is quite inevitable, for it is founded in the nature of things. We must observe this distinction in studying Mr. Girard's will, otherwise we run the risk of inverting the natural order of things by subordinating principles to form, the purpose to its means, the actual and executed gift for a known purpose to the prescribed or vaticinated modes of administering it, that are intended for adaptation to an unknown future, and of thus making the chief purpose of the gift dependent on the very often unwise directions prescribed for its future security and efficiency."

Little less than startling is the suggestion that the State or City could, by legislation enacted by either of them after Girard's death, alter or affect the terms of his will respecting the creation and administration of Girard College which did not call for or require legislation to make it an operating charitable institution. There is nothing in the testator's will or in any legislation by the Common-

wealth or the City that serves to make Girard College a public charity or that requires that it be publicly administered. On the contrary, we hold, on the basis of the compelling testamentary evidence, already noted, that Girard College is a private charity capable of being lawfully administered by private trustees.

In removing the Board of City Trusts as trustee of Girard College and in substituting the private individuals as trustees for that purpose, the Orphans' Court acted well within its jurisdiction and powers. It has had jurisdiction over testamentary trusts at least since the Act of March 29, 1832, P. L. 190, §4: see *Wilson v. Board of Directors of City Trusts*, 324 Pa. 545, 548, 188 A. 588, where it was said that "Whatever may have been the uncertainty as to the jurisdiction of the orphans' court prior to 1832, the Act of March 29, 1832, P. L. 190, Section 4, and the decisions which followed it, cleared away. It provided that the jurisdiction of the several orphans' courts shall extend to embrace trustees who are accountable in any way for the property of a decedent." It has also had jurisdiction over trusts for the benefit of orphans since the Act of March 27, 1713, 3 Pa. Stat. at Large 14, Chap. 197.

The Fiduciaries' Act of April 18, 1949, P. L. 512, §331(5), which is the presently applicable statute, confers exclusive power on the Orphans' Court to remove a trustee "when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office." Over and above such statutory power, it has long been established that the Orphans' Court possesses the power of a court of chancery in aid of an exercise of its jurisdiction: see *Stevens's Estate*, 200 Pa. 318, 322, 49 A 985. What was said there in the opinion of the court below, whereon this court affirmed *per curiam*, is presently so pertinent as to justify the following quotation: "The courts of Pennsylvania have looked with favor upon charities, and the law of the state, as administered from the beginning of this province, has always been broad enough to discern the objects of every

charity and to preserve and enforce it, nothwithstanding any defect, such as want of power in the trustees or otherwise: The Apprentices' Fund Case, 13 Pa. C. C. Rep. 241. Therefore, when a charity is established in any manner, such a slight impediment as a defect or want of power in the trustee to execute it does not stand in the way; the charity remains; the trustee is declared incapable of acting, and a competent trustee is appointed in his place. Chancery here steps in to enforce it and commits it to some one who may lawfully administer it: Frazier v. St. Luke's Church, 147 Pa. 256."

The contention which the appellants advance that the Act of 1869, supra, which created the Board of Directors of City Trusts, divested the Orphans' Court of any power to remove the Board of City Trusts as trustee is utterly lacking in merit. As this court recognized in *Philadelphia v. Fox*, 64 Pa. 169, 183 (1870), all that the Act of 1869 did was to make a change in the internal organization of the municipality by providing that one class of its functions (i.e., as fiduciary for private charities) should be administered in a manner different from what it had been theretofore. In *Wilson v. Board of Directors of City Trusts*, supra, where the Orphans' Court was held to possess plenary powers over trusts administered by the Board of City Trusts, it was pointed out that "The Act [of 1869] in no way ousted [the Orphans' Court's] jurisdictional control, and the fact that [the Act] required reports to be made to the City Council and others did not divest the orphans' court of the normal control that it had hitherto exercised over all trust estates created by will. Its power has been recognized since the passage of that Act."

No useful purpose would be served by discussing at greater length the jurisdiction of the Orphans' Court over testamentary trusts and their fiduciaries or the power of that court to remove a trustee who is incapable or fails or refuses to carry out a trust as its creator directed. Such a situation calls for the removal of the incapable trustee and

the substitution of a fiduciary able to administer the trust as its provisions require; and the jurisdiction and power of the Orphans' Court to that end is not open to question. Here, there is a conclusively adjudicated want of capacity in the Board of City Trusts to administer Girard College in accordance with the intention and directions of the testator's will. There was, therefore, nothing other for the Orphans' Court to do in the circumstances but to remove the inhibited trustee and appoint trustees capable of administering the College as Stephen Girard intended and prescribed.

The appellants assert that the action of the Orphans' Court in removing the Board of City Trusts and in substituting therefor trustees capable of administering Girard College in accordance with the settlor's directions constituted State action which denied to the minor applicants the equal protection of the laws guaranteed them by the Fourteenth Amendment. As support for this contention, they cite *Shelley v. Kraemer*, 334 U. S. 1, and *Barrows v. Jackson*, 346 U. S. 249. The pertinently distinguishing feature of those cases is that in each of them it was a *constitutionally guaranteed right* of an individual that was subjected to the inhibited discrimination based on race or color. No such right is involved here, as we believe will clearly appear.

Concededly, it has long been authoritatively established that an official act of a member of a State's judiciary constitutes State action within the contemplation of the Fourteenth Amendment. No one will gainsay that. See *Ex Parte Virginia*, 100 U. S. 339; also, *Shelley v. Kraemer* and *Barrows v. Jackson*, *supra*. The fallacy in the appellants' argument lies in the fact that the complained-of discrimination in the instant case does not impinge upon any *civil right* to which the minor petitioners have a constitutional claim along with all other members of the community. Not coming within the qualifications required by Stephen Girard's will for admission to his Orphanage, the present applicants have no right to be beneficiaries thereof in defiance of the

settlor's plainly expressed and legally valid testamentary provisions. Neither *Shelley v. Kraemer* nor *Barrows v. Jackson, supra*, teaches otherwise.

On the contrary, in *Shelley v. Kraemer*, where a party to a racially restrictive agreement relative to private property sought equitable enforcement of the covenant against Negro purchasers of portions of the restricted property, the Supreme Court took occasion to observe, first of all, that "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property" and then declared that "Equality in the enjoyment of property rights . . . [is] an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." The undisputed facts in the *Shelley* case made it clear that, but for the active intervention of the State court, the Negro purchasers would have been free to occupy the properties in question without restraint. Thus, the State had made available to the covenantees the full coercive power of government to deny to the Negro purchasers, on the ground of race or color, the constitutional right to own and enjoy property which they were willing and financially able to acquire and which the grantors were willing to sell. As contrasted by the Supreme Court, "The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to the petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." In the instant case, no one not possessing the qualifications prescribed by Girard's will for admission to the Orphanage can claim any right that entitles him to share Stephen Girard's largesse on an equal, or any, footing with those whom Girard himself expressly made the beneficiaries of his bounty.

Barrows v. Jackson was also a suit by a covenantee of a racially restrictive agreement, brought to recover from a breaching covenantor the contractually stipulated dam-

ages due for selling restricted property to a Negro. The only parties to the suit were the signatories to the restrictive agreement. No attempt was made to enjoin the Negro purchaser from enjoying the property which he had so acquired. The State court on the rationale of the *Shelley* case, denied the plaintiff a recovery. The Supreme Court, in affirming the judgment of the State court, reasoned as follows: "To compel respondent to respond in damages would be for the State to punish her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. . . . If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant."

Thus in *Barrows*, just as in the *Shelley* case, although in a different form of action, it was the supplicated judicial enforcement of a claim arising out of a racially restrictive covenant in impairment of a Negro's constitutionally guaranteed civil right that was deemed to be discrimination by State action which the Fourteenth Amendment inhibits. This seems plain enough, for, immediately after referring to the effects of the restrictive covenant on the owner's exercise of her property rights, the Supreme Court at once said,—"The next question to emerge is whether the State action in allowing damages deprives anyone of rights protected by the Constitution". Thereupon, the Court concluded that the State action did so operate, saying,—"If a state court awards damages for breach of a restrictive covenant, a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur. Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians. Denial of this right by state action deprives such non-Caucasians, unidentified but identifiable, of equal protection of the laws

in violation of the Fourteenth Amendment. See *Shelley*, supra."

Nowhere in *Shelley v. Kraemer* or in *Barrows v. Jackson* did the Supreme Court denounce as void the restrictive covenants respectively involved in those cases. Such covenants are recognized as valid *inter partes* so long as they are adhered to voluntarily. Notwithstanding the discriminatory nature of a covenant restricted on the basis of race or color, no one can compel the covenantor to sell his property in violation of his restrictive agreement or otherwise force him to desist from abiding by his covenant. To do so would be to invade *his* constitutionally guaranteed right of dominion over his own property. And, that would be no less true of Stephen Girard's trust were we to hold that, because of his testamentary limitation on admissions to Girard College to "poor male white orphans", he has been guilty of an unconstitutional discrimination by virtue of the Fourteenth Amendment wherefor all *poor male* orphans, regardless of color, are eligible for admission to that institution.

The elements which brought the "equal protection" clause of the Fourteenth Amendment into play in *Shelley v. Kraemer* and *Barrows v. Jackson* consisted of State action for the enforcement of a discrimination based on race or color in impairment of a constitutionally protected right of an individual to which he, along with all other members of the community, is entitled as a matter of public law. It is plain enough from the words of the Fourteenth Amendment that it is "laws", and not claims under some private testament, whereof the Amendment guarantees everyone "equal protection". Manifestly, therefore, an element essential to the invocation of the "equal protection" clause of the Fourteenth Amendment is absent in this case.

We are not unmindful that, when the Supreme Court reversed our former action in this case and remanded the record for further proceedings not inconsistent with its opinion, there was likewise present only the action of the State agency as trustee of Girard College and the racial

discrimination on admissions imposed by Girard's will which the trustee was enforcing. In short, then as now, there was no violation of a constitutionally protected right possessed alike by everyone. We have already indicated our belief that, had the Supreme Court intended that the court below, having jurisdiction and supervisory control over the trustee of Girard College, should admit the Negro applicants forthwith, it would have plainly said so just as it did in *Sweatt v. Painter*, supra. This deduction is, of course, a negative approach to the intended scope of the Supreme Court's ruling. Our positive interpretation of it is that *a State agency*, even when acting as the trustee of a private charity, can have *no part* in the enforcement of a racially discriminatory restriction regardless of what type of rights it affects. It need hardly be remarked that, had our study of the Supreme Court's opinion led us to the conclusion that no trustee, other than the Board of City Trusts, can lawfully administer Girard College, we would have been alert to carry out the ruling to the full extent of its implications.

Furthermore, if all that is necessary to constitute a denial of equal protection of the laws in violation of the Fourteenth Amendment is State action and a racial or religious discrimination, then no private charity created by will can any longer dispense its benefits on the basis of race, creed or color according as its settlor has stipulated. A will is without any force or effects whatsoever until it is probated. This is so elementary as not to require citation of authority; and, equally fundamental it is that the admission of a will to probate constitutes judicial action whether it be by the register, the surrogate or some other officer thereunto authorized by law. It is plain enough, therefore, that State action is necessary to effectuate a will which creates a private charity whose benefits are dispensed on the basis of race, creed or color. What keeps such a charity, so created and restricted, from constituting a violation of the "equal protection" clause of the Fourteenth Amendment is that no one who does not come within the settlor's definition of

beneficiary has a constitutionally protected right (or any right for that matter) to share in the charity's benefits.

Further dissimilarity between the *Shelley* and *Barrows* cases on the one hand and the instant case on the other is in the fact that in the former cases the full power of the State by way of court enforcement of the racially restrictive covenants was sought and relief refused, while in the present instance all that has happened is that, in the course of the proceeding instituted by the two Negro boys for admission to Girard College, the Orphans' Court, having been authoritatively advised that the Board of City Trusts is incapable of administering Girard College as its founder directed, removed the incapable trustee and appointed other fiduciaries who can administer the College in the manner Stephen Girard prescribed. In so doing the Orphans' Court did no more than it would do in any case upon ascertaining that a trustee was no longer capable of discharging his fiduciary duties competently and adequately.

The appellants argue, however, that, because the substituted trustees will continue to restrict admissions to Girard College to poor male orphans of a particular race, whom Girard by his will specified as alone eligible for admission, the action of the Orphans' Court will deny the present applicants of a different race the equal protection of the laws guaranteed them by the Fourteenth Amendment. In aid of this argument, the appellants unwarrantedly charge that the Orphans' Court's exercise of its judicial power in the premises was "for the sole purpose of excluding Negroes from Girard College" and that the action "was taken solely in order to enable the school to remain segregated." The Orphans' Court did not act to *exclude* Negroes from Girard College. None had ever been admitted. What the Orphans' Court did was to refuse to admit the Negro applicants because they did not qualify for admission under the terms of Girard's will. And, to speak of Girard College as remaining "segregated" as a result of the Orphans' Court action is to use a term whose present-day stigmatizing connotation has no proper place in this case.

The appellant City persists in its complaint that it was denied procedural due process by the Orphans' Court's entry of its decrees, after the remand, without further hearing before that court. Brief reference to the procedural steps pursued in this litigation will at once disclose that all parties have been fully heard. Hearings on the petitions of Foust and Felder were held for days before the Orphans' Court where testimony was taken *in extenso* and the matter thoroughly argued by counsel. Exceptions to the hearing judge's decrees were filed and thereafter argued by counsel for appellants before the court sitting *en banc*. Following entry of the final decrees, the matter was appealed to this court and then carried to the Supreme Court of the United States. When the cause was lately remanded to the Orphans' Court pursuant to the Supreme Court's mandate, there was no occasion for any further hearing in the matter. The record was complete. It was the duty of the Orphans' Court, just as it is our duty now, to proceed in a manner not inconsistent with the opinion of the Supreme Court. And, that, we think we are doing.

The decrees are affirmed at the cost of the Commonwealth of Pennsylvania and the City of Philadelphia.*

DISSENTING OPINION BY MR. JUSTICE MUSMANNO.

In May, 1777, Stephen Girard of Bordeaux, France, landed in Philadelphia where he took up permanent residence and entered into business. Success smiled on his various commercial enterprises and, as ship owner, banker, and merchant, he accumulated an amount of wealth that made his name one to be conjured with on the American Rialto. As he climbed the ladder of financial achievement he held aloft at all times the flag of gratitude for the opportunities afforded him in the New World. He became a citizen of the United States and was elected a member of the Philadelphia "City Councils."

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* This is the official judgment of the Supreme Court of Pennsylvania in this case.

In 1830, having reached that age when a good man contemplates how the shadow of his life may still be helpful to the living after he will have departed, he went into consultation with a scrivener, his conscience, his sense of appreciation and undying spirit of patriotism. From the conference emerged his last will and testament which, when probated in 1831, shone as a lyrical paean to Philadelphia which he loved with a devotion akin to that which Cincinnatus is reputed to have borne toward Rome. Girard revealed through this last writing that he could not do too much for the City which had been a foster mother to him. He left her funds with which to lay out new streets, pave and widen others, remove wooden houses, cleanse the docks on the Delaware, and supply water for various sections of the City. He provided for a competent police force, a division of the City into "watch districts," and in general made available facilities to "improve the city property, and the general appearance of the city itself; and, in effect diminish the burden of taxation, now most oppressive especially on those, who are the least able to bear it."

The will of Julius Caesar, dramatically proclaimed to the populace by Marc Antony, which gave to every Roman citizen the sum of 75 drachmas* and to the general citizens the right to breathe fresh air in his "private arbours and orchards," was a rather niggardly posthumous gift in comparison to what Girard gave to Philadelphia.

Girard was generous to public charitable institutions as the Philadelphia Hospital, the Pennsylvania Institution for the Deaf and Dumb, the Orphan Asylum of Philadelphia, and various other organizations for relief of the poor and the distressed.

He bestowed a legacy on the public schools of Philadelphia. He bequeathed $300,000 to the Commonwealth of

* According to Everyman's Smaller Classical Dictionary by E. H. Blakeney and J. Warmington the modern equivalent of a drachma would be about 8 pence, so that the prodigal Caesar left to each Roman citizen approximately twelve dollars.

Pennsylvania for internal improvements by canal investigation. He left some modest sums to relatives, friends, and servants, but the mass of his estate was dedicated to the public welfare. Thus, he said: "And whereas, together with the object just adverted to, *I have sincerely at heart the welfare of the city of Philadelphia*, and, as a part of it, am desirous to improve the neighborhood of the river Delaware, so that the health of the citizens may be promoted and preserved, and that the eastern part of the city may be made to correspond better with the interior: Now, *I do give devise and bequeath all the residue and remainder of my real and personal estate of every sort and kind and wheresoever situate . . . unto the Mayor, Aldermen and citizens of Philadelphia their successors and assigns in trust to and for the several uses intents and purposes hereinafter mentioned and declared of and concerning the same.*"*

Of this residue in trust he allocated two million dollars for the establishment of a college for "poor white male orphans." This college later became known as the Girard College and is the subject of the instant litigation.

It is difficult to visualize the will of a private individual more dedicated to public business than Stephen Girard's. Schools, streets, docks, canals, river distribution, public hospitals and asylums are items which one finds in the budget of nations, states, and municipal corporations, not private householders. These are matters for the consideration of the State and indeed the State of Pennsylvania recognized that fact at once.

Only three months after Girard's death the General Assembly of Pennsylvania (on March 24, 1832, P. L. 176) enacted legislation directing the City of Philadelphia to carry into effect the will of Stephen Girard.

Two weeks later, (Apr. 4, 1832, P. L. 275) by statute, Pennsylvania authorized the City of Philadelphia to provide "for the election or appointment of such officers and agents

* Italics throught, mine, unless otherwise indicated.

as they deem essential to the due execution of the duties and trusts enjoined and created by the will of Stephen Girard."

On February 27, 1847, (P. L. 178), the Legislature passed a special Act making Philadelphia the guardian of the person and property of every child admitted to Girard College. The same Act authorized Philadelphia to bind out Girard College orphans to suitable occupations from the age of 14-18 to 21.

The college was opened on January 1, 1848, under the direct management, supervision, and authority of City Council. The City Council ran the college as authoritatively and completely as an engineer runs a locomotive. From March 21, 1833, until December 18, 1869, the City Council passed 48 ordinances dealing exclusively with Girard College. The ordinances covered such subjects as erection of buildings, the appointment of architects, purchase of construction materials, buying of books, desks, blackboards and other educational paraphernalia, appointment of committees to administer the college, the making and approving of contracts appertaining to the college in all its various phases of activities, the appointment of, and payment of salaries to principals, teachers, janitors, and other employees, organization of faculty and courses of instruction, employment of counsel, etc., etc.

The General Assembly of Pennsylvania at no time relinquished its control over Girard College and it never relaxed its concern to make of the enterprise an institution worthy of the State. On April 20, 1853, (P. L. 624), it passed an Act providing that "the mayor, aldermen and citizens of Philadelphia, or such persons as they shall direct and appoint, shall bind by indentures as apprentices, the orphan children in the Girard College for Orphans."

By 1869 it became evident to the State Legislature that the normal duties pressing upon a City Council in governing a large metropolitan city the size of Philadelphia were too many and onerous to allow for an active management, superintendency and operation of a college. Accordingly, on June 30, 1869 it passed an Act (P. L. 1276) creating the

Board of Directors of City Trustees to be composed of the Mayor of Philadelphia, the Presidents of Select and Common Councils and twelve other citizens to be appointed by the judges of the Court of Common Pleas of Philadelphia County. This Board, which came to be known as the Board of City Trusts, took over the direct and immediate management of Girard College. Under its direction and control the College flourished. The $2,000,000 originally bequeathed has now, through good business methods, as well as wise and careful investing, become $98,000,000, with an annual income of $2,000,000. The real property of the Girard estate is worth $10,000,000. Over Girard College hovered not a cloud of apprehension or fear for the future, until the Orphans' Court of Philadelphia entered an order which has brought about the lamentable state of affairs which is the subject of the present litigation.

On September 24, 1954, two Negro fatherless boys, William Ashe Foust and Robert Felder, aged 8 and 7 years respectively, applied for admission to Girard College on the basis that they qualified in every respect under existing law to meet entrance requirements. The Board of City Trusts rejected the applications, asserting that it had no power to admit "other than white boys to Girard College." The boys, as well as the City of Philadelphia and the Commonwealth of Pennsylvania, petitioned the Orphans' Court to order the admittance of the orphan applicants. The Orphans' Court dismissed the petitions. This Court on November 12, 1956, affirmed the action of the Orphans' Court, thus excluding Foust and Felder from Girard College. (386 Pa. 548).

On appeal thereto, the Supreme Court of the United States, on April 29, 1957, reversed the judgment of this Court, with the declaration that: "The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amend-

ment. Brown v. Board of Education, 347 U. S. 483." It accordingly remanded the cause "for further proceedings not inconsistent with this opinion."

This Court, then, on June 28, 1957, vacated the decrees of the Orphans' Court excluding Foust and Felder and remanded the cause to the Orphans' Court "for further proceedings not inconsistent with the opinion of the Supreme Court of the United States as set forth in its said mandate."

On September 11, 1957, the Orphans' Court of Philadelphia County, without any hearing and without allowing Foust, Felder, the City of Philadelphia, or the Commonwealth of Pennsylvania, who are all party litigants, an opportunity to be heard in argument or otherwise, dismissed the petitions of Foust and Felder and ordered the removal of the Board of Directors of City Trusts. On October 4, 1957, the same Court appointed thirteen named persons as trustees of the Girard Estate on the assumption that, being private individuals, they would not be subject to the restrictions of the Fourteenth Amendment and could accordingly legally exclude Foust and Felder from the Girard College because they are Negroes.

I pass over without discussion the action of the Orphans' Court in refusing the parties a hearing on so momentous a piece of litigation. To dwell on this manifest denial of due process of law would be to expatiate on the obvious, emphasize the glaring, and underline the italics of the horizon. But, putting aside the Court's palpable denial of the fundamental right of every litigant to be heard before a cause is adjudicated against him, I submit that there was ample reason for this Court to reverse the Orphans' Court because its errors in the disposition of this case have not been merely procedural, spasmodic, or minor; they have been constant, undeviating, and monumental.

In its opinion of September 11, 1957, the Orphans' Court said: "It is a universally accepted rule of law that the disqualification or incompetency of a trustee shall not be permitted to defeat the purposes of a charitable trust,

nor to impeach its validity, nor to derogate from its enforcement—the trustee must be fitted to the trust and not the trust to the trustee."

But the Supreme Court did not say that the Board was disqualified or incompetent because it refused to admit Foust and Felder to Girard College. It only said that under the law of the land, the Board could not exclude these children. No one charged the Board with misconduct, no one complained that its management of the Stephen Girard was not exemplary, no one moved for dismissal of the Board. The Act of June 30, 1869, which brought the Board into existence has not been repealed or its powers minimized. By what authority may the Orphans' Court of Philadelphia County nullify an Act of the General Assembly?

Nor did the Supreme Court say that if the Board of City Trusts was removed as trustee, its successor could exclude Negroes from Girard College.

The fact of the matter is that no trustee, no matter how appointed, may practice in the Girard College a discrimination which is forbidden by the Fourteenth Amendment. The Girard College, because of the nature of its origin, its legislative history, its councilmanic management, its municipal control and subservience to governmental supervision is as much a public institution as the University of Pennsylvania and is, therefore, bound by the decision of the Supreme Court of the United States in *Brown v. Board of Education*, 347 U. S. 483.

It is no answer to this statement to say that the Girard College had its genesis in private funds. The Commonwealth of Pennsylvania was once a private grant and the Island of Manhattan once belonged to a private tribe of Indians.* Land and institutions may become public through purchase, through dedication, and through use. Girard College is public because Girard so planted it and because its whole

* The City Solicitor of Philadelphia well says in his excellent brief that: "The private property owned by Girard at the time of his death no longer exists, except in a highly mystical sense."

growth has been accomplished in the orchard of governmental care.

A reading of the will should be enough in itself to convince the mind that Girard brought into play every possible trumpet of the English language to proclaim that his whole fortune was to be devoted to the public welfare irrevocably. With the exception of a few small bequests, long ago satisfied, Girard's entire estate is now in the hands of the City of Philadelphia. In the case of *Soohan v. City of Philadelphia*, 33 Pa. 21, 28, this Court said: "This sacred trust was confided by Stephen Girard to the mayor, aldermen, and citizens of Philadelphia, who, by legislative enactment, have been succeeded by the City of Philadelphia . . . The directors of the Girard College are the creatures of an ordinance and *are merely the agents of the real trustee, the city.*"

Girard was so determined to prevent his estate from falling into the classification of a private institution that he declared that if the City of Philadelphia failed to carry out the provisions of his will, his estate would pass to the Commonwealth of Pennsylvania, and if the State violated his wishes, the United States would become the final beneficiary. It is not evident, then, that the action of the Orphans' Court, in turning the Girard estate over to private individuals, strikes at the very jugular vein of Girard's expressed intentions?

As a matter of law, the Orphans' Court cannot give away Girard College any more than it can give away a public park or City Hall.

The Supreme Court of the United States in its Opinion on April 29, 1957, said: "The will named as trustee the City of Philadelphia. The provisions of the will were carried out by *the State and City* and the college was opened in 1848."

If litigation had arisen over some college action performed in 1848, there could be no doubt, under this language of the Supreme Court, that, as of 1848, Girard Col-

lege would be accepted as a public institution. How much more must it be a public institution today when we realize that since 1848 the City of Philadelphia and the Commonwealth have exercised unceasing jurisdiction over Girard College?

By law and by provisions of the Girard will, the status of Girard College has been one of constant State and municipal responsibility, The launching of Girard College and its administration over the decades have brought into play governmental police powers and rights of eminent domain which could not possibly be exercised by private trustees. Members of the Legislature visit and inspect Girard College; its accounts must be open at all times to State inspection; the City of Philadelphia is required to submit reports on the College to the Legislature. The Treasurer of the City of Philadelphia handles the funds of the Girard Estate. The City Controller audits its accounts. The City is guardian of the persons and estates of the students. In the latter capacity it holds $2,940,716.16 in property.*

The principal body involved here is not the Board of City Trusts as such, but the City of Philadelphia itself. The City is not merely a trustee. It acts for the inhabitants of Philadelphia. It is a beneficiary of the trust. The Act of June 30, 1869, creating the Board of City Trusts, provides: "The duties, rights and powers of the City of Philadelphia, concerning all property . . . dedicated to charitable uses or trusts, the charge or administration of which are now or shall hereafter become vested in . . . the city *shall be discharged by said city* through . . . a board composed of fifteen persons, *including the mayor of said city* . . . who shall exercise all the *duties and powers of said city* . . . concerning any such property appropriated to charitable uses . . . to the extent that the same have been or may hereafter be, by statute law or otherwise, vested in and delegated to the said city . . ."

In an interpretation of the Act of 1869, this Court

*87th Annual Report, Board of Directors of City Trusts, p. 12.

said in the case of *Wilson v. Bd. City Trusts*, 324 Pa. 545, 555: "We cannot disregard the fact that the Mayor is the duly elected executive of one of the beneficiaries, the City, and that he represents not only himself as an individual but to a certain extent the citizens of Philadelphia who constitute the beneficiaries of all the trusts."

For 126 years Girard College has been administered as a public institution by public officials in their public capacities for the benefit of the public. If everything of a governmental character imbedded in the very sinews and fibers of Girard College were to be removed, it would be like withdrawing from a modern office building its structural framework. Take away the steel beams and columns of the Empire State Building and it would collapse into a mass of stone, bricks, mortar, glass and debris. Take away the governmental backbone of Girard College and it will be a shapeless mass of indirection and purposelessness. The action of the Orphans' Court if unreversed, creates a condition which approaches the dignity of chaos. It opens a Pandora's box of dilemmas, namely:

1. The Board of City Trusts is required to report to the City Council, the State Legislature, and the Courts of Common Pleas. Will the new board report to the City Council, Legislature, and Court of Common Pleas? If it does, then will its action not be State action? If it does not, how can the Orphans' Court decree do away with a requirement of the State Legislature?

2. Since the City remains as guardian of the person and estate of Girard City students, will that guardianship not bring the City within the application of the Fourteenth Amendment since the City is a branch of sovereign government?

3. While estoppel cannot operate against a State, is it not clear in honor and justice that when the Legislature of Pennsylvania, by the Act of 1832, enacted legislation which confirmed the State's acceptance of $300,000 be-

queathed to it by Girard, it bound itself to a governmental management and supervision over the Girard Estate?

4. The Girard will left to the City the working out of details because the City Council is elected by the people. XXI, Sc. 9, 28a. But what opportunity will the people have to control the actions of private trustees?

5. The Girard funds were mingled with City funds. After more than a century of public management, is it possible to determine the accretion due to public management, and will that accretion be paid back?

6. The Act of 1847 provided that students who reached 18 years of age were to be bound out by the City of Philadelphia to suitable occupations until they reached the age of 21. Will the City continue to do this?

7. Does the appointment of private trustees to manage Girard College make the College a private school? And will it now pay the taxes which are assessed against all private schools?

8. Etc.

9. Etc.

In order to make of Girard College a private institution it would be necessary to repeal at least five Acts of the Pennsylvania General Assembly;* It would be necessary to nullify 48 Ordinances of the Philadelphia City Council; it would be necessary to strip the College of all the public maintenance, supervision, and operation it has had for 126 years. It would be necessary to pay back all salaries paid public officials who have worked in the maintenance and operation of Girard College. The Orphans' Court can brandish no legal wand with which it can wipe out 126 years of continuous governmental control and shrink the oak tree of the Girard College of today into the

* Each of these statutes is entitled "An Act Relative to Girard College," and none uses the phrase "white male orphans."

acorn left by Stephen Girard. It must always be kept in mind that when the buildings of Girard College were finally constructed the fund of $2,000,000 left by Girard was practically exhausted. It was the good business judgment exercised by the Philadelphia City Council and the equally wise administration, under State direction, demonstrated by the Board of City Trusts which revived the fund and finally brought it to its present opulent state of $98,000,000.

In this Opinion I am first directing my attention to the fallacies in the Orphans' Court's decisions so that we can better and more easily understand what I regard to be the errors of this Court which has affirmed the Orphans' Court action. The Orphans' Court ordered what is legally and physically impossible. Girard College is intrinsically, architecturally, and economically* a creature of the State. The Orphans' Court has no jurisdiction to remove the Board of City Trusts. Under the Act of 1869, members of the Board may be removed only by vote of two-thirds of membership of the Court of Common Pleas (made up of 21 judges) of Philadelphia County.

The Orphans' Court says in its opinion: "Our course has been clearly charted." The charting to which it refers is the statement made by the Majority of this Court in its decision of November 12, 1956 (386 Pa. 548, 566): "Even if the Board of Directors of City Trusts *were* deemed to be engaged in 'State action' in the administration of the Girard Trust, petitioners would nevertheless not be entitled to the remedy they seek. If the city, because bound in its public or governmental actions by the inhibition imposed upon it by the Fourteenth Amendment, cannot carry out a provision of Girard's will in regard to the beneficiaries of the

* The funds of the College and those of the City have been so intermingled that the City Council used income from the Girard Estate for municipal purposes other than the College, amounting to $571,958.42, in the years 1833 to 1848 inclusive. (Report of Hon. George Wharton Pepper, Auditor).

charity as prescribed by him, the law is clear that the remedy is, not to change that provision, which, as an individual, he had a perfect right to prescribe, but for the Orphans' Court, which has final jurisdiction over the trust which he created, to appoint another trustee." (Emphasis in original).

This advice on the part of the Majority of this Court, I must say with all respect, was not a very wise one. Instead of following the channel marked by the Constitution, the advice indicated that a Northwest Passage might be found which would permit the Orphans' Court to reach a land where it had no right to be at all. Considering the public nature of Girard College there is no way for any administrator of that institution to avoid the Fourteenth Amendment.

On October 14, 1957, the Orphans' Court denied the petions of Foust and Felder, of the City of Philadelphia, and of the Commonwealth of Pennsylvania, for reconsideration and vacation of its decree entered September 11, 1957 (the one dismissing the petitions of the applicants and removing the Board). In denying the petitions the Court said: "We are of one mind that the Supreme Court of Pennsylvania in its opinion filed in this case on November 12, 1956, (386 Pa. 548) squarely ruled upon all of these issues. We are bound by that decision. Our decree of September 11, 1957, is in conformity therewith."

Before such a statement, one can only stand in awe. What the Orphans' Court overlooks, and it is a strange oversight indeed, is that the decision of this Court from which the above quotation was taken, was reversed by the Supreme Court of the United States! And when a decision is reversed it is like the Andrea Doria at the bottom of the sea. It sinks in its entirety, not only in part. Rudder, bridge, hull, superstructure, compass, and quadrant all go. Thus, it is futile for the Orphans' Court to say that it is charting its course by compass and quadrant which are rusting in the submarine cemetery of law which is no more.

The action of the Orphans' Court in dismissing the Board of City Trusts and appointing thirteen so-called private trustees to operate the Girard Estate was more than an act of dubious legality. It was one of manifest illegality. By a stroke of the pen the Orphans' Court, if its action is not reversed, siphons $98,000,000 from the Treasury of the City of Philadelphia into the depositary of thirteen private individuals without compensation to the City, it reads into the will of Stephen Girard language which is not there, it passes over language which *is* there, it nullifies State statutes and City ordinances, it loses sight of a Constitutional amendment and misreads the plain wording of the mandate of the Supreme Court. However, it is interesting to observe that the Orphans' Court is not too certain, in spite of its assertion that its course was "clearly charted", that it is entirely confident that the course it selected actually conducts to the port it is seeking. In appointing thirteen private trustees, it chose six of them from the Board of City Trusts which it had already declared as disqualified and incompetent! It could not have believed that the Board was entirely disqualified and incompetent when it accepted almost 50% of the Board's membership to participate in the so-called private trusteeship. And it is well to observe, as pointed out by counsel for the City of Philadelphia, that: "These six constituted a majority of the living appointed members of the Board of Directors of City Trusts and included five of the eight members of the executive committee of the Board."

Does pinning a badge of private trustee on six heretofore declared public trustees remove the so-called incompetency of which the Orphans' Court speaks? It is interesting to note also that although, according to the Orphans' Court, the Board of City Trusts has been disbanded, it appears in this appellate litigation as an appellee, thus being triumphant at its own supposed funeral.

It is enigmatic to me why this Court sent the case back to the Orphans' Court after the Supreme Court stated quite

clearly what its decision was. This Court had decided that Foust and Felder should not be admitted to Girard College. The Supreme Court reversed that decision. What else could have been meant than that Foust and Felder were now to be admitted? The Majority Opinion makes a point of the language used by the Supreme Court in its order remanding the cause for "further proceedings not inconsistent with this opinion." What proceedings would there be other than admitting Foust and Felder to Girard College? There was nothing else pending. The admittance or rejection of the applicants was the only issue in the entire litigation. In support of its position of exclusion the Majority cites the case of *Sweatt v. Painter*, 339 U. S. 629. The Supreme Court there held that the "Fourteenth Amendment required that the applicant be admitted to the University of Texas Law School." It also used the language embodied in the case at bar, namely, "The judgment is reversed and the cause is remanded for proceedings not inconsistent with this opinion." In the case at bar the applicants are minors. There are certain preliminaries which must be attended to before they may be admitted, even following a decision which would admit them on the ground that the Girard College is a public institution: there must be certain releases from relatives, the City must become the guardian, indenturing must be considered. "Further proceedings" obviously refers to the entire operation required to get Foust and Felder into Girard College, which certainly an appellate court would not spell out in detail.

I will now address myself more particularly to the Majority Opinion of this Court which affirms in toto the action of the Orphans' Court. At the outset I will say that several of the cases cited by the Majority support the position of the appellants rather than the appellees. For instance, in *Vidal et al. v. Girard's Excutors*, 43 U. S. 126, the Supreme Court held that the *City of Philadelphia* was legally capable of executing the Girard trust. In *Girard v. Philadelphia*, 74 U. S. 1, the question again arose as to

whether the City of Philadelphia, after the consolidation Act of 1854, could still function as trustee of the Girard estate. The Supreme Court held that it could and should so function.

The Majority cites *Holdship v. Patterson*, 7 Watts 547, 511, where Chief Justice Gibson said that a testator "has an individual right of property in the execution of the trust, and to deprive him of it would be a fraud on his generosity."

This is like quoting the Ten Commandments or reassuring the world that honesty is the best policy. The quotation asserts an immutable principle in the law, but its application in the *Holdship* case bears no logical relationship to what is involved in the case at bar, as will be observed from the syllabus of the case which succinctly states: "A benefactor may provide for a friend the means of subsistence for himself and family, without exposing his bounty to the debts or improvidence of the beneficiary. He has an individual right of property in the execution of the trust, of which he cannot be deprived by an execution against the trustee."

The Majority quotes the aphorism that "the trustee must be fitted to the trust and not the trust to the trustee." But, like many aphorisms, this also has its counterpart, and that counterpart is to be found in Section 397 of the Restatement, Trusts, namely, "If the settlor manifests an intention that the intended charitable trust shall not arise or shall not continue *unless the person named by him acts as trustee*, the intended charitable trust fails unless the person named by him as trustee acts as trustee." *

Nothing could be clearer in Girard's will than that he intended the City of Philadelphia to be the trustee of his estate. In fact, as already indicated, the failure of the City

* If the administration of a laboratory for medical research is assigned to a physician, the substitution of a shoemaker might well wreck the institution and in such case it would be better that the trust fail than that the health and life of patients should be jeopardized.

to qualify would bring about a termination of the trust, and the passing over to the remainderman, the Commonwealth of Pennsylvania.

The Majority Opinion says that: "It is not possible to read Girard's will without being deeply impressed with the fact that it was *the college, as a private charity*, and *not the trusteeship of the city*, that was the primary object of the donor's testamentary scheme." (Italics in original)

This, of course, is like saying that one is more interested in the maintenance and operation of an office building than he is in the architect who is to build it. But he cannot have a building without the architect. Girard could not have a college without a trustee, and he specified that the trustee should be the City of Philadelphia. The City was the horse and the college the carriage. Without the horse the carriage could go nowhere.

The Majority admits that the trustee "was a necessary and unavoidable incident of the trust," and thus the testator availed himself of the services of the City. The Majority errs, however, when it says that in selecting the City, Girard "availed himself of the services of the only existing local corporate body capable of administering the trust in perpetuity."

The Majority of this Court* uttered this same inaccuracy in its Opinion in the *Girard Will Case*, 386 Pa. 548. Its repetition does not improve its standing in the realm of facts and realities. The fact of the matter is that continuous trustees were not rare in 1830. An advertisement in the New York Evening Post, August 6, 1822, proclaimed: "The public will readily perceive, that the advantages of this company to *protect property* for the benefit of *infants* or *others*, are far greater than those of individual executors or other trustees, who are always liable to casualties . . . By placing such property in the charge of this company *who have continued succession*, there can be

* The membership is slightly changed since 1956.

no danger whatever of any such casualties." ** (Italics in original)

When Girard wrote his will there were many corporate fiduciaries to handle trusts in perpetuity.*** Girard could also have provided for a self-perpetuating board of trustees if he had chosen to do so. The Dartmouth College charter provided for such a board.****

In stating that Girard chose the City of Philadelphia as trustee only because of its perpetual existence, the Majority speculates. But why speculate, when it is so evident why Girard made his particular selection? Girard wanted the City of Philadelphia to run the College because the City government was made up of representatives of the people. Girard knew that with public operation, the College would be continually bathed in the spotlight of popular interest so that if any part of the citadel began to fall, because of incompetent management or corruption, the people could at the polls oust the bunglers or malefactors. Is this statement merely a deduction from the evidence in the case? Is it a conclusion drawn only from the history of the institution and the litigation which has gone with it? It is not. As respectable as such an argument would be, we do not depend alone upon history, logic, and reasonableness of view. We find Girard's specific intention expressed in the parchment of his last will and testament, namely, "In relation to the organization of the college and its appendages, I leave, necessarily many details to the Mayor, Aldermen and Citizens of Philadelphia and their successors; and I do, so with the more confidence, as, from the nature of my bequests and the benefit to result from them, I trust that my fellow citizens of Philadelphia *will observe and evince special care*

** I apologize for this item, taken from my Dissenting Opinion in the *Girard Will Case*, supra. but since the Majority repeated what it said in that case, on this subject, I had no recourse but to go to the same cupboard for the antidote.

*** Smith. Development of Trust Companies in the United States.

**** *Trustees of Dartmouth College v. Woodward*, 17 U. S. 518.

and anxiety in selecting members for their City Councils and other agents." (Art. XXI, Sec. 9)

If language of this specificity can be ignored, then fogs of confusion have enveloped the dictionary, and mists of ambiguity have made written communication of thought a snare and a delusion. Girard had but one underlying purpose in the disposition of his secular riches, and that was to benefit Philadelphia, that is, its people, and it certainly was not illogical thinking on his part to conclude that the best sentinels to stand guard over his bequeathed treasures were the representatives of those who would enjoy his largess.

The Majority even goes so far as to say, quoting from the Majority Opinion in the *Girard Will Case*, 386 Pa. 548; that the Girard College is not a school at all, but "a home where the fatherless boys eat, sleep, study and live together." If we omit the word "fatherless," how does that language differ from a description of any other male college? Is not the Lafayette College in Easton a home where boys eat, sleep, study and live together? Is that also not true of LaSalle College in Philadelphia, and Haverford Colleg in Haverford, and Kings College in Wilkes-Barre? Girard College differs from these named colleges only in that the Girard students do not pay for tuition or maintenance, but, then, students do not pay for tuition or maintenance at the Naval Academy at Annapolis or the Military Academy at West Point, so that payment or nonpayment is not the criterion by which one determines whether an institution is a school or not.

The Majority Opinion says that: "Not a penny of State or city money has ever gone into it [Girard College]; no taxpayer has even been called upon to contribute to it." This argument was used in the *Girard Will Case* in 1956 by the then Majority of this Court. It was shown then to be without substantiation, but it is here being repeated and served again, but with no more flavor of plausibility then attended its original appearance on the platter of consideration. How can the Majority ignore that the State and the

City have spent "not a penny" but countless tens and perhaps hundreds of thousands of dollars in making Girard College the institution it is today? Who can calculate the cost to the State of the printing, clerk hire, and secretarial service which went into the actions of the General Assembly in holding hearing, conducting investigations, drafting bills and enacting them into law? Who knows how much it cost the City of Philadelphia for the investigations and hearings attendant on the 48 ordinances passed by the Council of Philadelphia with regard to Girard College? How much of government money was spent in salaries for State and City officials who gave of their official time in behalf of Girard College? Who can calculate how much it cost the City of Philadelphia and the General Assembly prior to 1869 to organize and actually operate the College? Who knows how much it cost for all the special visitations, for the audits, for the inspections and examinations conducted by the State of Pensylvania and the City of Philadelphia in behalf of Girard College? Who knows what it cost the City to work out the investments which have increased the capital of Girard College from $2,000,000 to $98,000,000?*

The Majority says that "The Supreme Court did not say that there is any Constitutional or other legal barrier to the removal of the Board of City Trusts as trustee of Girard College in order that the orphanage can be administered in accordance with all of the testator's express directions including the qualifications for admission to the student body." The Supreme Court did not say that there could be a legal barrier to the removal of the Board of City Trusts because there was no necessity to say that. It decided only the issue before it. There certainly would have been no point in saying what this Court should do with

* I apologize again for repeating what I said in my Dissenting Opinion in *The Girard Will Case*, but that statement is as true today as it was in 1956, just as the Majority's statement is as unveritable today as it was in 1956.

regard to the Board of City Trusts, and certainly there would have been no point in referring to other persons who *might* be brought forward as potential trustees.

The Majority Opinion says that some of the legislative enactments in behalf of the Girard Estate were "purely administrative neither envisioned nor required by Girard's will," but if there can be a difference of opinion on this point, there should be none on the point that that legislation was the pulmotor to the Girard estate which, had it not been for the direction, supervision, and expert business management given by legislatively created agencies, would have perished.

The Majority says that what Chief Justice Lowrie said in the case of *Philadelphia v. Girard's Heirs*, 45 Pa. 6, 25, is "peculiarly apposite here." Chief Justice LOWRIE said in that case, as quoted by the Majority: "In all gifts for charitable uses the law makes a very clear distinction between those parts of the writing conveying them, which declares the gift and its purposes, and those which direct the mode of its administration. And this distinction is quite inevitable, for it is founded in the nature of things. We must observe this distinction in studying Mr. Girard's will, otherwise we run the risk of inverting the natural order of things by subordinating principles to form, the purpose to its means, the actual and executed gift for a known purpose to the prescribed or vaticinated modes of administering it, that are intended for adaptation to an unknown future, and of thus making the chief purpose of the gift dependent on the very often unwise directions prescribed for its future security and efficiency." This language may be, as the Majority says, very apposite, but it is not very clear. However, even if we were to gather from the above quotation what Chief Justice LOWRIE had in mind, we still do not see how what he said in 1863 can overrule what the Supreme Court of the United States said in 1957.

The Majority says that "on the basis of the compelling testamentary evidence . . . Girard college is a private

charity capable of being lawfully administered by private trustees." But as I stated before, how can this Court or the Orphans' Court remove the City as trustee when the *will* makes the City the trustee? Of course, if the City were incapable, incompetent, or unwilling to act as trustee, the Orphans' Court might then, under the rule that a trust will not fail for want of a trustee, appoint another trustee. But the City *is* capable, it *is* competent, it *is* willing to act as trustee. *Why then should it be removed when the removal runs counter to the wishes of the testator?* The provision in the Girard will that the college be limited to male white orphans is no stronger a provision than that the City should administer and care for the estate. The City of Philadelphia is the tabernacle of the Girard Estate, it is the ark of the covenant. The whole history of the legislation, maintenance, direction of Girard College and the litigation over the estate is permeated with Philadelphia. Girard College is as much a part of Philadelphia as Benjamin Franklin is indelibly a part of Philadelphia's history.

This Court has heretofore looked with a rather critical eye on the business of the removal of a trustee. In *Mathue's Estate*, 322 Pa. 358, Chief Justice KEPHART said: "The removal of a trustee is a drastic action, which should only be taken when the estate is actually endangered and intervention is necessary to save trust property."

In *Hartman's Estate*, 331 Pa. 422, 428, we said: "Where there is no loss to any of the parties in interest, courts are reluctant to remove fiduciaries appointed by will."

United States Circuit Court Judge RIDDICK said in the case of *Sternberg et al. v. St. Louis Union Trust Co.*, 163 F. 2nd 714, 719 (certiorari denied 68 S. Ct. 267): "A trustee appointed by will or deed may not be removed by the courts unless there appears a clear necessity for the removal to save the trust property."

Certainly there is no such necessity here.

It could never have been Girard's intention that, with

an amendment to the United States Constitution, all his plans should go awry. He could never have intended that when the United States Constitution went in one direction, his college should go in another. He was interested in founding a college for poor male children. He said "white male orphans" because the times and the law would not have permitted a collective school for free children and slave children. That was the whole sum and substance of his statement. The language of the whole will demonstrates this, Girard's whole life proves it.

Even if we were to assume arguendo that by substitution of trustees Girard College would become a private trust, the question would still remain: Is the substitution of trustees legally proper? The Majority says that the substitution of trustees is necessary in order to carry out Girard's primary intent. The Majority reasons itself into assuming that Girard's primary intent was to exclude Negroes from Girard College. But such an assumption is to attribute to Girard an intent which is not only contradictory to Girard's history of dedication to the furtherance and betterment of the welfare of the people but it is in opposition to the terms of his will. The Majority quotes from Girard's will—"only after providing for the College as hereinbefore directed as my *primary object*," the Majority emphasizing the words "primary object." Girard's primary object, true, was the establishment and maintenance of the college but his primary object was not to exclude Negro orphans from that college.

What would Girard say today if he could be asked whether he desired that a private trustee administer the College? Would he answer that he wishes Negroes to be excluded and thus lose all the benefits of a govrnment-administered trust, or would he say that the City of Philadelphia, though it may no longer bar Negroes because of the Fourteenth Amendment of the United States Constitution, should continue the administration with all the benefits attendant upon public administration? To strip from Girard

College all the advantages of governmental administration such as tax exemptions, guaranteed investments, municipal supervision, State protection, publicly audited accounts, etc., only so that Negroes may be excluded from Girard College, is not to carry out Girard's primary purpose, but to defeat it! In view of the almost nonexistent rights of Negroes at the time Girard wrote his will, it is in accordance with history, with law, and established facts, to conclude that Girard's failure to include them as specified beneficiaries of his bounty was merely the result of his passive acceptance of conditions as they then existed. In any event, his failure to include Negroes does not evidence a primary intent that if they cannot be excluded by the City as trustee then Girard College must lose all the benefits which Girard expressly and specifically sought by providing for a governmental trustee.

The Majority devotes a page to the powers of the Orphans' Court of Philadelphia. No one questions its powers. What is questioned is the use of its powers in this case. The Majority says that the Fiduciaries Act of 1949 confers authority on the Orphans' Court to remove a trustee "when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office." But where is the proof in this case that the interests of the Girard Estate are likely to be jeopardized by the continuance in office of the Board of City Trusts, which has been a guardian angel to the Girard Estate and a ministering angel to the Girard College?

The Majority quotes from *Stevens's Estate*, 200 Pa. 318, which speaks of the power of Chancery, to remove a trustee who lacks power to execute a trust. Again, we agree on the law, but again I must say that the Majority-cited law has no application to this case. It is not contended here at all that the Board of City Trusts lacks power in executing the trust.

The Majority says that when a charity is established, "such a slight impediment as a defect or want of power in

the trustee to execute it does not stand in the way; the charity remains; the trustee is declared incapable of acting, and a competent trustee is appointed in his place." But there is no adjudication that the Board of City Trusts labors under any want of capacity or power to administer the Girard College in accordance with the nature and purpose of the Girard will. The Supreme Court of the United States held that under the present state of the law the Board of City Trusts may not exclude Foust and Felder from Girard College. As I have already indicated, it did not say that the trustee was incapable. It did not say that the trustee should be removed. It said that the machinery running Girard College was governmental. It did not suggest that the machinery should or even could be removed. It recognized a fact, namely, that Girard College is a public institution and that, therefore, this Court should initiate such proceedings as would be necessary to put its decision into effect. This could only mean that, once the necessary preliminaries were attended to, Foust and Felder were to be admitted to Girard College.

The Majority Opinion states in the way of a concession that "A State agency, even when acting as the trustee of a private charity, can have *no* part in the enforcement of a racially discriminatory restriction." (Emphasis in original). This is not the core of the case. As I have already discussed, the real questions are whether or not a private trustee may or should be substituted for the Board of City Trusts, and if such substitution of trustees would make Girard College a private institution so as to take its administration out of the reach of the Fourteenth Amendment. I believe that negative answers to such questions are as inevitable as the daily sunrise.

Furthermore the Majority overlooks one of the most vital provisions of the will, and to which I have already adverted, namely: "But, if the said city hall shall knowingly and wilfully *violate any of the conditions hereinabove and hereinafter mentioned, then I give and bequeath the said*

remainder and accumulations to the Commonwealth of Pennsylvania, excepting however the rents, issues and profits of my real estate in the City and County of Philadelphia, which shall forever be reserved and applied to maintain the aforesaid College, in the manner specified in the last paragraph of the XXIst clause of this will." If the Orphans' Court felt that the City knowingly and wilfully violated Girard's will by pressing for admittance of Foust and Felder into Girard College, it could only declare a termination of the trust under the above-quoted terms of the will, since Girard had already provided for an alternative gift upon failure of the specifically named trustee to administer the estate. The Majority overlooks our statute of April 24, 1947, P.L. 100, §10, which reads: "Except as otherwise provided by the conveyor, if the charitable purpose for which an interest shall be conveyed shall be or become indefinite or impossible or impracticable of fulfilment, or if it shall not have been carried out for want of a trustee or because of the failure of a trustee to designate such purpose, the court may, on application of the trustee or of any interested person or of the Attorney General of the Commonwealth, after proof of notice to the Attorney General of the Commonwealth when he is not the petitioner, order an administration or distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyor, whether his charitable intent be general or specific."

Public welfare would not approve of such a termination. Girard would be appalled at such a termination. Girard regarded the founding and the continued existence of Girard College so essentially a crystallization of his intention that he conditioned his very trust on it. The administration of the trust by the City of Philadelphia should therefore continue as heretofore, minus the unconstitutional requirement.

A dissenting opinion that is earnestly written because

the writer is disheartened at what he sees to be a manifest violation of legal principles may extend itself into an inordinate length since he wants to answer every paragraph, sentence, and phrase which contributes to the palpable injustice. However, there must be an end somewhere and I know of no better citation with which to terminate this Opinion than the case of *Kerr v. Enoch Pratt Free Library of Baltimore City*, 149 F. 2nd 212, cert. denied, 326 U. S. 721, where the facts are sufficiently similar to the ones in the case at bar as to make the reasoning therein unanswerable by the Majority in this case. Enoch Pratt of Baltimore gave to that City a library with certain conditions which were met by the Maryland Legislature and the Baltimore City Council. Funds were subsequently contributed to the institution by Andrew Carnegie. After the library had been operating some time, a Negro girl applied for admission as a trainee in the institution. The application was rejected and she appealed to the Courts, claiming that equal protection of the laws had been denied her. The United States Circuit Court of Appeals (Fourth District) upheld her contention. Chief Judge SOPER, speaking for the Court, said:

"*The donor could have formed a private corporation* under the general permissive statutes of Maryland with power both to own the property and to manage the business of the Library independent of the State. *He chose instead to seek the aid of the state to found a public institution* to be owned and supported by the city but to be operated by a self-perpetuating board of trustees to safeguard it from political manipulation; and this was accomplished by special act of the legislature with the result that the powers and obligations of the city and trustees were not conferred by Mr. Pratt but by the state at the very inception of the enterprise . . . . *It is our view that although Pratt furnished the inspiration and the funds initially, the authority of the state was invoked to create the institution* and to vest the power of ownership in one instrumentality and the power

of management in another, with the injunction upon the former to see to it that the latter faithfully performed its trust. We know of no reason why the state cannot create separate agencies to carry on its work in this manner, and *when it does so, they become subject to the constitutional restraints upon the state itself.*"

I would admit William Ashe Foust and Robert Felder to Girard College.

Appendix B

TEXT OF STATUTES INVOLVED

PENNNSYLVANIA ACT OF JUNE 30, 1869, P. L. 1276

A FURTHER SUPPLEMENT

To an Act, entitled "An Act to incorporate the City of Philadelphia, approved the second of February, one thousand eight hundred and fifty-four, creating a board called directors of city trusts."

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same,* That from and after the first day of July next, all and singular the duties, rights and powers of the City of Philadelphia, concerning all property and estate whatsoever, dedicated to charitable uses or trusts the charge or administration of which are now or shall hereafter become vested in or confided to the city of Philadelphia, shall be discharged by the said city through the instrumentality of a board composed of fifteen persons including the mayor of said city, the presidents of the select and common councils * for the time being, and twelve other citizens, appointed as hereinafter provided, to be called directors of city trusts, who shall exercise and discharge all the duties and powers of said city, however acquired, concerning any such property appropriated to charitable uses, as well as the control and management of the persons of any orphans or others, the objects of such charity, to the extent that the same have been or hereafter

* The Legislature, at its 1919 Session, amended the Charter of the City, providing for a single Councilmanic Chamber, reducing the Board to fourteen persons.

may be, by statute law or otherwise, vested in or delegated to the said city or the officers thereof.

SECTION 2. The judges of the supreme court, together with the judges of the district court and the court of common pleas of the city and county of Philadelphia, shall form a board of appointment,[1] of which the chief justice of the supreme court shall *ex officio* be president, which shall convene in the city of Philadelphia, at such time and place as the said chief justice shall appoint, within eight weeks from the passage of this act, and select and appoint, from the citizens of said city, twelve persons to serve, during good behavior, as members of the before-mentioned board of directors of city trusts, subject, however, to removal as hereinafter provided; vacancies in the number of said directors of trusts shall be filled from time to time by the said board of appointment; and any director of trusts may be removed from his office by the concurrent vote of two-thirds of the members of the board of appointment.

SECTION 3. Said directors of trusts shall meet every month, and as often as the business entrusted to them may require; a majority of the whole shall constitute a quorum for the transaction of business; at their first meeting after organization, and annually thereafter, they shall elect from their own number a president, who shall serve until the first day of the following year, and also a secretary, who shall be a salaried officer and not a member of the board, to serve for the same period; the treasurer of the City of Philadelphia shall be the treasurer of the said directors of trusts.

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[1] By Article V, Section VI, of the Constitution of Pennsylvania, the jurisdiction and powers theretofore possessed by the District Courts and Courts of Common Pleas were vested in the Courts of Common Pleas.

Article V, Section XXI, of the Constitution of Pennsylvania, directs that the judges of the Supreme Court shall not exercise any power of appointment.

See Act of Assembly, page 10.

SECTION 4. The said directors of trusts shall have power to make rules and by-laws for the proper regulation of their business, to appoint as many agents as in their judgment shall be required for the proper discharge of all the duties delegated to said directors, and determine the duties and compensation of all such agents and appointees; also in the name of the said city, and in accordance with the conditions of said charitable trusts, to make all leases, contracts and agreements whatsoever, which, in the course of the administration and management of said property, it may from time to time become necessary and proper to make and execute; and it shall be the duty of the said directors of trusts, for and in the name of the said City to do, perform and discharge, all and singular, whatever acts and duties are or from time to time may become proper or necessary to be done by the said city in discharge of said trust, and to make an annual report thereof to the Councils of the City, to the board of appointment and to the Legislature of the state of Pennsylvania.

SECTION 5. It shall be the duty of the said directors of trusts, immediately after their organization, to provide a suitable place for the safe keeping of all the title papers, books of account, records and documents whatsoever of the said city, appertaining to the property, the care and management whereof, and the trusts and duties, the discharge whereof, for the said city, it is intended to devolve upon said directors of trust; and thereupon, on notice to the agents and employees of the city having such title papers, account books, records and documents in their charge, the same shall be delivered into the custody of the said board of trusts.

SECTION 6. The said directors, in the discharge of their duties, and within the scope of their powers aforesaid, shall be considered agents or officers of said city; but no compensation or emolument whatever shall be received for such services, nor shall any of them have or

acquire any personal interest in any lease or contract whatever, made by said city, through said directors, or through any agent or employee, whatever, appointed by them.

SECTION 7. That so much of any act of assembly as is hereby altered or supplied be and the same is hereby repealed.

PENNSYLVANIA ACT OF MARCH 24, 1832, P. L. 176 (1831-1832 volume)

AN ACT

To enable the Mayor, Aldermen, and Citizens of Philadelphia to carry into effect certain improvements; and execute certain trusts.

* * * * * * *

SECTION 10. *Be it further enacted by the authority aforesaid*, That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia, to exercise all such jurisdiction, enact all such ordinances, and do and execute all such acts and things whatsoever as may be necessary and convenient for the full and entire acceptance, execution and prosecution of any and all the devises and bequests, trusts and provisions contained in the said will, which are the subjects of the preceding parts of this act, and to enable the constituted authorities of the City of Philadelphia to carry which into effect, the said Stephen Girard has desired the legislature to enact the necessary laws.

SECTION 11. *And be it further enacted by the authority aforesaid*, That no road or street shall be laid out, or passed through the land in the county of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the same shall be recommended by the Trustees or Directors of said college, and approved of by a majority of the Select and Common Councils of the City of Philadelphia.

PENNSYLVANIA ACT OF APRIL 4, 1832, P. L. 275 (1831-1832 volume).

A SUPPLEMENT

To the Act entitled "An act to enable the mayor, aldermen and citizens of Philadelphia to carry into effect certain improvements and to execute certain trusts."

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same:* That the Select and Common Council of the city of Philadelphia, shall be and they are hereby authorized to provide by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard.

PENNSYLVANIA ACT OF FEBRUARY 27, 1847, P. L. 178

AN ACT

Ralative to the Girard College for Orphans.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonweatlh of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same,* That the guardians for the relief and employment of the poor of the city of Philadelphia, the district of Southwark, and the townships of the Northern Liberties and Penn, be and they are hereby authorized, with the consent of the surviving mother, guardian, next friend, or by their own authority, if there be no such mother, guardian, or next friend of any poor white male orphan child within this Commonwealth, between the age of six and ten years, for whose admission to the Girard College for Orphans application shall have been made, to bind such orphan child by indenture, to the mayor, alder-

men and citizens of Philadelphia, as trustees under the will of Stephen Girard, deceased, as an orphan to be admitted into the said college, to be there maintained and educated according to the provisions, and in the manner and under all the regulations and restraints directed or contained in the said will, or as the said corporation of the mayor, aldermen and citizens of Philedelphia shall lawfully ordain, under the said will; which said indenture shall not express any term or time when the said binding shall expire; but such binding shall, nevertheless, expire at furthest, before the said Orphans shall attain the age of eighteen years, or at the pleasure of the said trustees at any time after he shall have arrived at between the ages of fourteen and eighteen years, or at any time before his attaining the said age of fourteen years, when the said orphan shall, by mal-conduct, cease to merit the benefits of the said college; and the said trustees shall duly declare the said fact, and such orphan child shall be bound to abide by and submit to such provisions, regulations, and restraints, as fully as if he were of full age, and consented thereto at the time of such binding, and shall be entitled to the benefits of the said college, according to the will of the testator; and the said parties shall be mutually entitled to relief for breach of duty by the other, in the same manner and by the same tribunals as is now provided by law, in regard to apprentices and their master or mistress, respectively.

SECTION 2. That it shall be lawful for the said mayor, aldermen and citizens of Philadelphia, and for such persons as they shall, by ordinance, authorize, appoint, and direct for this purpose, to bind, by indenture, any and every such orphan child who shall have remained in the said college until he shall arrive at between fourteen and eighteen years of age, and before his arrival at the age of eighteen years, to serve as an apprentice to any suitable person in this Commonwealth, in either of the occupations of agriculture, navigation, arts, mechanical trades or manufactures, ac-

cording to the will of the said testator; and such orphan child shall be bound to serve the time in his respective indenture contained, so as such time or term of years of such apprentice do expire at or before the age of twenty-one years, as fully, to all intents and purposes, as if he were of full age at the time of making such indenture; and the said indenture shall contain, and be deemed valid in containing such covenants and stipulations for the feeding, clothing and educating such orphan child as the said corporation, by ordinance, from time to time, shall direct. And in case the master of any such apprentice shall die before the expiration of such apprenticeship, it shall be lawful for the said corporation, or such persons as they shall authorize, appoint and direct, as aforesaid, again to bind such orphan child to such other person in this Commonwealth, as they shall approve, being of one of the occupations aforesaid, and so on from time to time, as often as such master shall die before such apprentice shall attain the age of twenty-one years, all which indentures shall be of the same effect and validity, and shall in all respects be as subject to the acts of assembly which now are or at the time shall be in force in this State, in regard to apprentices and their masters and mistresses, as if the said identure had been made in conformity to the said acts.

SECTION 3. The said corporation of the mayor, aldermen and citizens of Philadelphia, shall be the guardian of every such orphan child during the time that he shall remain in the said orphan college; and in case any such orphan child, at or before the time of such binding to the said corporation as an orphan, or during his remaining in such college, shall possess or become entitled to any effects or property, the said corporation shall be entitled, in like manner as other guardians, to demand and receive the same from any person having possession thereof, or owing the same, and to give acquittance therefor; and it shall be the duty of the said corporation, to take care of the same as guardian, and to make the same productive as far as

resonably can be, and to deliver and pay over the same with the increase, to the said orphan on his attaining the age of twenty-one years, or to his legal representatives if he shall die before attaining that age.

SECTION 4. That it shall be lawful for the said the mayor, aldermen and citizens of Philadelphia, to make application, at any time after such binding, to the judges of any court in the city and county of Philadelphia, having equity jurisdiction to cancel and annul the said identure, or other instrument of binding, so that the same shall be no longer binding upon the said corporation, as trustees of the said orphan college; and upon such application being made, and notice thereof being given to the overseers or guardians of the poor of the district in this Commonwealth in which such orphan had a settlement, at the time of his admission, or to the "guardians for the relief and employment of the poor of the city of Philadelphia, the district of Southwark, and the townships of Northern Liberties and Penn," if such orphan had no settlement in this State, at the time of his admission, and sufficient cause being shown to the satisfaction of the said court, it shall be lawful for the said court to decree and order that the said indenture shall be cancelled and annulled, either absolutely or upon such terms as the court shall see fit; and the same shall thereupon be cancelled and annulled accordingly, and the said orphan child, and the corporation aforesaid, and all other persons be respectively discharged therefrom.

PENNSYLVANIA ACT OF APRIL 20, 1853, P. L. 624

AN ACT

* * * *relative to the Girard College for Orphans.*

SECTION 6. That the mayor, aldermen and citizens of Philadelphia, or such persons as they shall by ordinance direct and appoint, shall bind by identure as apprentices,

the orphan children in the Girard College for Orphans, in the manner, and upon the terms and conditions mentioned and contained in the act entitled "An Act relative to the Girard College for Orphans," approved the twenty-seventh day of February, one thousand eight hundred and forty-seven, to suitable persons within this Commonwealth, in suitable occupations, such as agriculture, navigation, arts, mechanical trades, and manufactures, as mentioned in the will of the late Stephen Girard.

PENNSYLVANIA ACT OF MAY 23, 1887, P. L. 168

AN ACT

To authorize the binding of any orphan, to any city, to be made by mother, guardian or next friend.

SECTION 1. *Be it enacted, &c.*, That in all cases where by any law of this Commonwealth, the guardians for the relief and employment of the poor of any city, district or township, are authorized to bind any orphan to any city, the said binding may be made by the mother, guardian or next friend of the said orphan, and shall be of the same force and effect, and as binding upon the said orphans, as if the identure were executed by the guardians of the poor.

PENNSYLVANIA ACT OF APRIL 18, 1949, P. L. 512, 20 PURD. STAT. §320.331.

§320.331 GROUNDS FOR REMOVAL

The court shall have exclusive power to remove a personal representative when he—

(1) is wasting or mismanaging the estate, is or is likely to become insolvent, or has failed to perform any duty imposed by law; or,

(2) has been adjudged a lunatic, a habitual drunkard, or a weak-minded person; or,

(3) has become incompetent to discharge the duties of his office because of sickness or physical or mental incapacity and his incompetency is likely to continue to the injury of the estate; or,

(4) has removed from the Commonwealth or has ceased to have a known place of residence therein, without furnishing such security or additional security as the court shall direct; or,

(5) when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office.

(This section expressly is made applicable to trustees by §921 (20 PURD. STAT. §320.921) of the same Act.)

Appendix C

CITATIONS OF THE PRINCIPAL ORDINANCES OF THE CITY OF PHILADELPHIA RELATING TO THE GIRARD ESTATE AND GIRARD COLLEGE*

January 31, 1833 (p. 157) (management of the Girard Estate generally).

March 21, 1833 (p. 159) (provided for the erection of the College and named it "The Girard College for Orphans").

March 28, 1833 (p. 160) (supplemented Ordinance of March 21, 1833).

November 21, 1833 (p. 159) (management of the Girard Estate generally).

July 14, 1836 (p. 161) (provided for the purchase of books and equipment for the College).

July 26, 1837 (p. 161) (management of the College generally).

December 3, 1840 (p. 167) (management of the Girard Estate generally).

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* The page citations in the case of ordinances adopted between the years 1833 and 1841, inclusive, refer to "Digest of Ordinances of City of Philadelphia and Acts of Assembly relating thereto", Crissy, 1841. In the case of ordinances adopted between the years 1847 and 1854, inclusive, the page citations are to "Digest of Acts of Assembly Relating to the City of Philadelphia and the (Late) Incorporated Districts of the County of Philadelphia and of the Ordinances of the said City and Districts", Duane, Hood and Myers, 1856. For the year 1855 and subsequent years, the citations are to the annual volume of ordinances.

January 28, 1841 (p. 162) (required all contracts entered into by the trustees to be approved by the City Councils).

March 11, 1841 (p. 167) (salaries fixed for officers of the Girard Estate and College).

June 3, 1841 (p. 168) (supplemented Ordinance of March 11, 1841).

February 27, 1847 (p. 242) (admission requirements for the College).

May 27, 1847 (p. 245) (provided for a Board of Directors to manage the College).

September 16, 1847 (p. 246) (provided for staff and faculty positions and fixed salaries).

November 9, 1848 (p. 249) (visitation committee of the City Councils established).

December 21, 1848 (p. 249) (supplemented Ordinance of May 27, 1847).

September 13, 1849 (p. 250) (care of property belonging to students at College).

January 10, 1850 (p. 251) (organization of faculty and courses of instruction).

January 16, 1851 (p. 252) (supplemented Ordinance of January 10, 1850).

December 2, 1852 (p. 252) (binding out of orphans).

April 20, 1853 (p. 250) (provided generally for the College).

July 7, 1853 (p. 254) (binding out of orphans).

April 27, 1854 (p. 254) (duties of the secretary of the College).

November 30, 1855 (p. 257) (appropriation for construction of buildings within the College).

June 25, 1856 (p. 172) (changes made in the supervision and management of the College).

March 9, 1860 (p. 110) (employment of counsel).

Juny 18, 1860 (p. 315) (management of Girard Estate generally).

December 22, 1860 (p. 447) (management of Girard Estate generally).

December 13, 1864 (p. 483). (authority to compromise suit with Girard's heirs).

June 29, 1868 (p. 277) (appointment of solicitor for the trustee of Girard's Estate).

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SUPREME COURT. U. S.

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IN THE

Supreme Court of the United States

No. 947 October Term, 1957

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH, Mayor of the City of Philadelphia, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST and ROBERT FELDER,

Appellants

v.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA and THIRTEEN SUBSTITUTED TRUSTEES OF THE ESTATE OF STEPHEN GIRARD, DECEASED,

Appellees

On Appeal from the Supreme Court of Pennsylvania

REPLY JURISDICTIONAL STATEMENT OF COMMONWEALTH OF PENNSYLVANIA, APPELLANT

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REPLY JURISDICTIONAL STATEMENT OF COMMONWEALTH OF PENNSYLVANIA, APPELLANT

1. THE REMOVAL OF THE CITY AS TRUSTEE RAISES A FEDERAL QUESTION

Appellees argue that the appellants are merely appealing the denial to Negro applicants of admission to Girard College. All of the appellants, however, assert that the removal of the public trustee by the Orphans' Court raises a federal question.[1] Under Pennsylvania law, pursuant to the Fiduciaries Act of 1949, the Orphans' Court is empowered to remove a trustee when "the interests of the estate are likely to be jeopardized by his continuance in office". To use this power in order to withdraw from the ambit of the Fourteenth Amendment a school, which has been administered by the City of Philadelphia for over a century in conformity with the Will of the testator and the numerous express mandates of the Pennsylvania legislature, and

[1] The other questions raised by appellee's brief: namely, 1. the drawing into question of the Pennsylvania Fiduciaries Act of April 18, 1949; 2. the bypassing and foreclosing of the rights of the United States under the Will of Stephen Girard; and 3. the public attributes of Girard College by reason of administration by the City of Philadelphia, the extensive and necessary implementing legislation, the ancillary duties of the City mandated by the Will and the legislature with respect to the College and the Orphans, and the indirect use of public funds (not tax exemption) have been discussed in the Jurisdictional Statement filed by all Appellees.

which has already been adjudicated by this court to be subject to the restrictions and limitations of the Fourteenth Amendment raises a substantial federal question.

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2. THE COMMONWEALTH IS A NECESSARY AND INDISPENSABLE PARTY

The Commonwealth has been a party to this litigation since its inception in 1954. Counsel for the Thirteen Substituted Trustees of the Estate of Stephen Girard, deceased, now questions the standing of the Commonwealth of Pennsylvania in this case.[2] The Orphans' Court in this case sustained the standing of the Attorney General. 4 Pa. D. & C. 671, 718, fn. 3. Indeed, the Attorney General appeared at the express suggestion of the learned hearing judge.

The Supreme Court of Pennsylvania has unequivocally declared that in all cases involving charitable trusts, the Attorney General is a necessary and indispensable party. *Garrison's Estate*, 391 Pa. 234 (1958), *Pruner's Estate*, 390 Pa. 529 (1957). In both of these cases, the trustees were purely private parties and

[2] The standing of the Thirteen Substituted Trustees is certainly open to question. A stay is in effect and the Board of City Trusts is now continuing to administer the Estate and the College. The Substituted Trustees have appeared without permission of the Court and without filing a petition for leave to intervene. They are not a party to this action. It is anomalous that these private individuals who have no interest or standing should presume to question the right of the Commonwealth to appear in this litigation in which it is a necessary and indispensable party.

yet the presence of the Attorney General as a party to the proceedings was required. The formal representation of the Commonwealth in all charitable trusts is necessary and desirable so that the public, which is the real beneficiary of the settlor's generosity, may be represented and that interest be protected. See *Bogert, Proposed Legislation Regarding State Supervision of Charities*, 52 Mich. L. R. 633 (1954); *Forer, Forgotten Funds*, 105 U. Pa. L. R. 1044 (1957).

The role of attorney general in the supervision of charitable trusts has a long and honorable history. The monarchs of England in the Tudor period had general superintendence over charitable uses. In performing such functions, the king acted through the attorney general.

According to Blackstone,

> "The king, as parens patriae, has the general superintendence of all charities, which he exercises by the keeper of his conscience, the chancellor. And therefore whenever it is necessary, the attorney general, at the relation of some informant (who is usually called the relator) files ex officio an information in the court of chancery to have the charity properly established." 3 *Blackstone, Commentaries*, Sec. 427. See *Attorney General v. Mayor*, 1 Bll. n. s. 312, 4 Eng. Rep. 888 (1827); *Eyre v. Countess*, 2 Will. P. 103, 119, 24 Eng. Rep. 659, 664 (1722).

The right and duty of the crown to supervise the administration of charitable trusts which was an accepted principle of law in the sixteenth century was clarified by the Statute of Uses. With the Reception, this practice was adopted as part of the common law

of the United States. *Trustees of the Philadelphia Baptist Ass'n v. Hart's Ex'rs.*, 17 U. S. (4 Wheat.) 1 (1819).

In other American jurisdictions where the problem has arisen, the courts have without exception held that the Attorney General is a necessary party in any litigation involving charitable trusts. *Thatcher v. St. Louis*, 343 Mo. 597, 122 S. W. 2d 915 (1938); *Trustees of Rutger's College v. Richman*, 41 N. J. Super. 259, 125 A. 2d 10 (Ch. 1956); *Passaic Nat'l Bank & Trust Co. v. East Ridgelawn Cemetery*, 137 N. J. Eq. 603, 45 A. 2d 814 (Ch. 1946); *Abel v. Girard Trust Co.*, 365 Pa. 34, 73 A. 2d 682 (1950); *Watson v. Wall*, 228 S. C. 500, 93 S. E. 2d 918 (1956).

The removal of the City of Philadelphia as trustee affects not only the two applicants for admission to Girard College but also the entire population of Philadelphia, Negro and White. The administration of this College like the administration of the library, the Art Museums, and other educational institutions involves the public as a whole, not merely those individuals who make use of the several institutions. Further, this Court has cited with favor these authorities who recognize that segregated educational institutions affect adversely the White as well as the Negro citizens. *Brown v. State Board of Education*, 347 U. S. 483, 494 Fn. 11 (1954). Therefore, in order to represent the totality of the public and in the proper exercise of the duties of his office to require that charities are administered in accordance with the laws of the Commonwealth of Pennsylvania and of the United States, the Attorney General is a necessary and indispensable party.

3. THE REMOVAL OF THE CITY VIOLATES THE RIGHTS OF THE TESTATOR, THE CITY AS TRUSTEE, AND THE PUBLIC

Appellees lay great stress upon the opinion of the Pennsylvania Supreme Court in *Brown et al. v. Hummell et al.*, 6 Pa. 86 (1847). We submit that the cited case is clear authority for the proposition that the Orphans' Court may not remove the City as trustee and establish an entirely new method of selecting trustees and administering the College. In the cited case, the legislature had passed an act altering the method of selection of trustees for an orphan home established by will. The Pennsylvania Supreme Court pointed out that a "private" charity was involved and held that the legislature could not alter a will. Note that the alteration was a slight one, merely changing the method of selection of private trustees, not a drastic metamorphosis in the nature of the trust from public to private. Nevertheless, the Pennsylvania Supreme Court held that the legislature could not change the designation of trustees which the testator had made. The court further held that to deprive the trustees of their rights and to deprive the beneficiaries of the benefit of the trusteeship of the responsible persons selected by the testator without notice and hearing violated the most fundamental principles of Anglo-American law.

The court's eloquent and majestic defense of the right of the trustees, the principal, and the deceased testator speaks for every testator, every trustee, and every principal. Even then, the court referred to its

duty to protect all trusts, including that of Stephen Girard. The court declared:

> "The beneficiaries in the Emaus Orphans' House are, doubtless, the orphan children to whom it is devoted; but, nevertheless, the trustees and principal have interests and franchises which are within the protection of the law. But as guardians of the trust, and dispensers of the charity, they are bound to attend to and protect the interests of the orphans, and the integrity of the will of the deceased. . . They were constituted the legal guardians of the estate, and were entitled to certain franchises, of all which they were deprived, without summons, hearing, or judgment, and by an act of the legislature, which, with regard to them, was rather a sentence of condemnation, than a law. . ." 6 Pa. 86, 93

These arguments apply with equal force to the attempt by the Orphans' Court to deprive the City of its authority to serve as trustee and to carry out its duties under the Acts of 1847 and 1853 to indenture the orphans admitted to Girard College and to serve as guardian of each such orphan.

---

4. THE INDEPENDENCE OF PRIVATE CHARITIES IS NOT IMPAIRED

The Commonwealth has explicitly declared in every brief filed in this entire litigation that nothing in its position would interfere with or affect the right of a settlor, by will or inter vivos deed, to establish a

charity for segregated or sectarian purposes. It follows, of course, that such a will must be probated and that such a deed must be recorded. In these matters, as in all litigation involving private individuals, no rights under the Fourteenth Amendment are drawn into question merely by using the necessary machinery of the courts. In the Estate of Stephen Girard, it is the designation of the City as trustee and its continued operation of the College for over a century which brings into play the Fourteenth Amendment, not mere administration by the Orphans' Court.

CONCLUSION

The Commonwealth of Pennsylvania is a necessary and proper party. The action of the Orphans' Court in removing the City as Trustee solely for the purpose of permitting the exclusion of Negroes from an institution which has been publicly administered for over a century violates the Fourteenth Amendment.

Respectfully submitted,

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SUPREME COURT, U. S.
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IN THE

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Appellees

On Appeal from the Supreme Court of Pennsylvania

ANSWER OF CITY, CITY OFFICIALS AND INDIVIDUAL APPELLANTS TO APPELLEES' MOTION TO DISMISS THE APPEAL AND DENY THE WRIT OF CERTIORARI.

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1. Appellants do not contest the proposition, by which appellees appear to set great store, that this Court ordinarily may not and should not review "nonfederal grounds of decision." (*Motion to Dismiss*, p. 14). But the view, which appellees seem to advance, that the Pennsylvania State Supreme Court limited itself in this case to the determination of "questions of state law" (*Motion to Dismiss*, p. 14) would certainly come as something of a shock to the members of that court who joined in Chief Justice Jones' extended exposition of the constitutional problems here

posed. Moreover, this antiseptic view of the State Supreme Court's decision is one which, at a later stage of appellees' brief, appellees themselves have some difficulty adhering to:

> "Once the fog created by appellants' fallacious assumptions is lifted, the basic issues involved in the instant appeal stand out clearly. Those issues are the freedom of testamentary disposition, the independence of private charities, and whether or not the Fourteenth Amendment in fact guarantees the rights claimed by appellants." (*Motion to Dismiss*, p. 40).

2. Thus appellees, in somewhat circuitous fashion, themselves concede that appellants have presented federal questions—questions which turn on "whether or not the Fourteenth Amendment in fact guarantees the rights claimed by appellants". The weighty brief which appellees have filed and which laboriously discusses the federal questions reveals that appellees themselves regard these issues as being substantial. Moreover, this Court has already decreed the substantiality of the questions by having granted certiorari and having reversed the court below in this same litigation. One of the very issues now before this Court is whether the lower courts have, as we contend, misconstrued the order of this Court to the injury of the appellants and this Court has held that the question of the meaning of its mandate raises a substantial question, *Alleghany Corp. v. Breswick*, U. S. , 2 L. Ed. 2d 374, as well as the issues which are appropriately left open to the court below on remand. *Alleghany Corp. v. Breswick*, *supra*. And certainly the importance of clarity in litigation which this Court has hitherto found controlled by *Brown v. Board of Education*, 347 U. S. 483, needs no demonstration.

Moreover, it would seem that where the Attorney General of the Commonwealth comes before this Court and states that what state courts of the state of which he is the chief law official have done violates the federal constitutional rights of Negro appellants and that the insti-

tution involved is still a public institution, the substantiality of the questions presented becomes too clear to require further demonstration.

3. Appellees either ignore or fail to grasp the core of appellants' contentions. According to appellees' brief:

> "Appellants' argument based on *Shelley*, *Barrows*, and *Railway Employes' Dept. A.F.L. v. Hanson*, 351 U. S. 225 (1956) is nothing more than a claim that because the individual appellants have been denied admission to Girard College by the state courts, the Fourteenth Amendment entitles them to admission.
>
> "The individual appellants are claiming that their minority group status transforms a state court adjudication that they have no rights in certain private property into an adjudication whereby the STATE discriminatorily deprives them of property rights."
>
> (*Motion to Dismiss*, p. 46)

But the above has never been appellants' basic position. Their position (apart from the contention that a paper change in trustees cannot in any event affect the fundamental character of an institution which has been essentially public for more than a century) is simply that this Court last year determined that so long as a governmental body administers Girard College, refusal of admission to Negroes *qua* Negroes violates the Fourteenth Amendment, even though the Will which established the College provides for discrimination against Negroes. Appellants submit that the action taken by the Orphans' Court, ousting a governmental body as trustee and denying appellants' admission to Girard College, was state action; that is was state action for the purpose and with the necessary effect of continuing the exclusion of appellants because they are Negroes which this Court held to be unlawful one year ago; and that State action, whether by courts or other state agencies, taken under the guise of "construing" this

Court's mandate which effectuates the exclusion of appellants because they are Negroes merely compounds the initial breach of the Fourteenth Amendment.

Appellees' failure to apprehend and meet appellants' contentions stems from appellees' insistence on starting the constitutional analysis at the point *after* the City of Philadelphia was removed as trustee (*Motion to Dismiss*, pp. 13, 16, 17). But this misses the crux of the case. It was the substitution of new trustees and the reason therefor which is the state action which brings into play the Fourteenth Amendment. In *Shelley v. Kramer*, 334 U. S. 1, this Court held that a state court could not apply its normal contract rules if the result of such an application was to deny the occupancy of land to Negroes on the basis of race; here appellants urge that a state court is prohibited by the Fourteenth Amendment from applying statutes or its common law authorizing the removal of a trustee where the sole and express purpose and result of such removal is to deny to Negro appellants on the basis of race the opportunity to attend Girard College, which opportunity, as this Court held on April 29, 1957, *Pennsylvania v. Board of Directors of City Trusts*, 353 U. S. 230, they possessed prior to the time that the state court sought to apply what it alleges its state rule of law to be.*

---

* Despite appellees' statement to the contrary (see *Motion to Dismiss*, p. 24), the overwhelming state authority would lead a court to eliminate the illegal condition, not oust the trustee. See, e.g., Restatement, Trusts §§166, 61; *Toner's Estate*, 260 Pa. 49, 103 Atl. 541 (1918); *Stout v. Stout*, 192 Ky. 504, 233 S.W. 1057 (1921); *Attorney General v. City of Lowell*, 246 Mass. 312, 141 N.E. 45 (1923); *Ruhland v. King*, 154 Wisc. 545, 143 N.E. 681 (1913); *D'Arcangelo v. D'Arcangelo*, 137 N.J. Eq. 63, 45 A. 2d 169 (1945); *Girard Trust Co. v. Schmitz*, 129 N. J. Eq. 444, 20 A. 2d 21 (1941); *Tennant v. Braie, Tothill*, 78, 1649 Ed.; *In Re Haight's Will*, 51 App. Div. 610, 64 N.Y. Supp. 1029 (1900); *In Re Beard*, 1 Ch. 383 (1908). *In Re Dominion Students Hall Trust* (1947) 1 Ch. 183; *In Re Queen's School Chester* (1910) 1 Ch. 796.

Appellees refer with evident distaste (*Motion to Dismiss*, p. 46, n. 13) to appellants' suggestion that had the Board of Directors of City Trusts in the first instance *admitted* appellants, a subsequent Orphans' Court order substituting private trustees and expelling appellants because they are Negroes would have been plainly unconstitutional. Appellees observe that the hypothetical situation "assumes, contrary to the facts of this case, that a trustee will commit a breach of trust" (*Motion to Dismiss*, p. 46, n. 13). Once again, appellees have missed appellants' meaning. The hypothetical situation assumed only that a trustee might elect to comply with the Fourteenth Amendment which is, even as against the Will of Stephen Girard, the supreme law of the land.

That the purpose of the Orphans' Court was to perpetuate the unlawful exclusion of appellants because they are Negroes is, for all practical purposes, acknowledged by appellees:

> "The removal of the city as trustee was necessary, not only to eliminate the state discrimination found on the prior appeal, but also to protect the rights of admission of eligible 'poor white male orphans', whom Stephen Girard selected as the beneficiaries of the Girard College Trust. In the light of the decision of this Court on the prior appeal, the city as trustee could no longer uphold the integrity of the Will and protect the interests of the named beneficiary class. Since there are more eligible poor white male orphans than can be admitted to Girard College,* for every Negro orphan admitted, one member of the beneficiary class selected by Stephen Girard will be denied admission." (*Motion to Dismiss*, pp. 42-43)

Nor is the unconstitutionality of the discriminatory end,

---

* The physical capacity of the school is 1,772, but there are only 1,300 students therein (See Jurisdictional Statement, p. 18)

so candidly described, in any way mitigated by appellees' quaint suggestion that, "To continue the City as trustee, with the requirement that it not refuse admission to Negroes, would deprive members of the named beneficiary class of their established rights, solely by reason of their race, in violation of the Fourteenth Amendment." (*Motion to Dismiss*, p. 43). The contention that the equal protection clause *requires continued racial discrimination against appellants because they are Negroes* is as gross a perversion of the manifest purposes of the Fourteenth Amendment as the cognate argument, which this Court rejected, that the Fourteenth Amendment gave constitutional sanction to a labor union's policy of excluding Negroes from membership. *Railway Mail Ass'n v. Corsi*, 326 U. S. 88, 94, 98.

4. The suggestion that the City of Philadelphia and the Commonwealth of Pennsylvania lack standing to raise these constitutional issues comes with ill grace from appellees "substitute trustees", many of whom were, until this Court reversed the Pennsylvania Supreme Court, running Girard College as members of the Board of City Trusts. *A priori*, the interest of the City and the Commonwealth in enforcing the constitutional rights of their citizens is eminently proper. Cf. *Brewer v. Hoxie School District. No. 46*, 238 F. 2d 91 (8th cir. 1956). And the state courts have in this case endorsed the propriety of their participation—especially as to the Commonwealth:

> "There is a serious question as to the right of the City of Philadelphia, acting through the Mayor and the Commission on Human Relations, to appear as a party litigant in this case. However, there is no doubt as to the standing of applicant, William Ashe Foust, nor the Attorney General of Pennsylvania. Accordingly, we have resolved the doubt in favor of the City; we have permitted it to appear; and we have given careful consideration to its position and the oral argument and brief which it presented in support

thereof." 4 Pa. D. & C. 2d 671, 718, fn. 3 (Orphans' Ct., Phila. 1955).

Moreover, the City of Philadelphia certainly has standing to complain of its illegal ouster as trustee of over $100,000,000 of property whcih belongs to it in trust, when such ouster was accomplished by means which violate the federal Constitution. *Barrows v. Jackson*, 346 U. S. 249, 254-260); *Brewer v. Hoxie School District No. 46*, 238 F. 2d 91, 104-5 (8th cir. 1956). Moreover, included in the property is approximately $1,000,000 in assets which are in the Girard Estate but which are not used by the college itself. Of course, all this was accomplished by the Orphans' Court on its own motion and without hearing.

It is submitted that the question is controlled in the instant case by this Court's recognition of the litigant status of all the present appellants when it took jurisdiction of this case a year ago. 353 U. S. 230. Perhaps the appellees' violent objection to the Commonwealth's standing is traceable to the disastrous effect to appellees of the Attorney General's position which with commendable candor concedes that the Negro appellants are still faced with state action which is in violation of the Fourteenth Amendment.

5. The appellants timely raised the question of the constitutionality of the Pennsylvania Fiduciaries Act of April 18, 1949, P. L. 512, Sec. 331 (5), 20 Purd. Stat. Sec. 320.331 (See Jurisdictional Statement, pages 4 through 7).* Moreover, it should be recalled that the Orphans' Court of Philadelphia County never allowed argument, a hearing or even briefs on the issue of its power to remove

* There is not one word in the opinion of the Supreme Court of Pennsylvania that it dismissed appellants' argument on the constitutionality of the Fiduciaries Act of April 18, 1949 because the Orphans' Court had not passed on it. The court in fact passed upon appellants' claim of unconstitutionality.

the City of Philadelphia as trustee, and the City was not removed as trustee *until after* appellants' Petition for Reconsideration and Vacation had been dismissed without argument or hearing.**

6. Appellants properly raised the question whether the ousting of the City of Philadelphia as trustee jeopardizes the interest of the United States as ultimate trustee under the Will of Stephen Girard. If a governmental body, state or federal, cannot be bypassed in favor of private trustees, then it is clear that since a governmental body must continue to operate and direct Girard College, Negro appellants must be admitted thereto. *Commonwealth v. Board of City Trusts*, 353 U. S. 230. If this Court questions whether appellants are capable of fully representing the proprietary interest of the United States in this proceeding, it would seem wholly appropriate for this Court to invite the participation of the Attorney General. Cf. *Brown v. Board of Education*, 347 U. S. 483; *Amalgamated Clothing Workers v. Richman Brothers*, 349 U. S. 600.

CONCLUSION

Despite appellees' protestations to the contrary, this is a case of racial discrimination: state judicial power was utilized voluntarily to perpetuate a deliberate policy of exclusion of Negroes and to alter 127 years of history solely

** Prior to this case, the Supreme Court of Pennsylvania had always held that the Orphans' Court was a Court of limited jurisdiction and could remove a trustee only for reasons set forth in the applicable statute. *Crawford's Estate*, 340 Pa. 187 (1940). "The Orphans' Court is a Court of limited jurisdiction, the extent of which is determined entirely by statute. Any warrant for its actions must be found in the language of the statutes which create and define its powers." *Mains' Estate*, 322 Pa. 243, 246 (1936); *Way Estate*, 379 Pa. 421 (1954).

to thwart the enjoyment of the constitutional rights of Negro appellants declared one year ago by this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957 No. 947

Commonwealth of Pennsylvania, City of Philadelphia, Richardson Dilworth, Mayor of the City of Philadelphia, Philadelphia Commission on Human Relations, William Ashe Foust and Robert Felder,

Appellants,

v.

The Board of Directors of City Trusts of the City of Philadelphia and Thirteen Substituted Trustees of the Estate of Stephen Girard, Deceased,

Appellees.

On Appeal from the Supreme Court of Pennsylvania

MOTION TO DISMISS APPEAL AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1957. No. 947.

Commonwealth of Pennsylvania, City of Philadelphia, Richardson Dilworth, Mayor of the City of Philadelphia, Philadelphia Commission on Human Relations, William Ashe Foust and Robert Felder,

Appellants,

v.

The Board of Directors of City Trusts of the City of Philadelphia and Thirteen Substituted Trustees of the Estate of Stephen Girard, Deceased,

Appellees.

MOTION TO DISMISS APPEAL AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal from the final judgment and decree of the Supreme Court of Pennsylvania be dismissed on the ground that the judgment below cannot be appealed to the Supreme Court of the United States under 28 U. S. C. § 1257(2), and on the further ground that no substantial federal question is presented. Since this Court is required

by 28 U. S. C. § 2103 to treat the appeal as a petition for certiorari, appellees request the Court to deny the petition on the ground that the case does not present a federal question of substance.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania in the present appeal (J.S. 39)[1] is reported as *Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844 (1958). The opinions and orders of the Orphans' Court of Philadelphia County are reported as *Girard Estate*, 7 Fiduc. Rep. (Pa.) 555, 606-610 (1957).

The opinions of the Pennsylvania courts in the prior appeal to this Court are as follows: opinion of the Supreme Court of Pennsylvania, *Girard Will Case*, 386 Pa. 548, 127 A. 2d 287 (1956); opinions of the Orphans' Court, *Girard Estate*, 4 Pa. D. & C. 2d 671 (1955), 4 Pa. D. & C. 2d 708 (1956). The opinion of this Court on the prior appeal, reversing the judgment of the Supreme Court of Pennsylvania, is reported as *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 230, rehearing denied, 353 U. S. 989 (1957).

JURISDICTION.

This Court has no jurisdiction by way of appeal under 28 U. S. C. § 1257(2) for the reason that the validity of a state statute was not drawn in question on the ground

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[1] "J.S." herein refers to appellants' Jurisdictional Statement on this appeal.

"J.R." herein refers to the Joint Record of appellants in the Supreme Court of Pennsylvania.

"App." herein refers to the Appendices attached to this Motion and Brief.

of its being repugnant to the Constitution of the United States and for the reason that there was no decision in the Pennsylvania courts in favor of the constitutional validity of a state statute.

This Court should also refuse jurisdiction by way of certiorari in view of the fact that there is no federal question of substance presented.

STATUTE INVOLVED

There is no statute involved in the present case. The Board of Directors of City Trusts was removed as trustee of the Girard College trust by an exercise of the inherent chancery powers of the Orphans' Court.

No alleged constitutional rights of the appellants were denied by the application or construction of any state statute.

The statutes cited by appellants relating to the administration of Girard College by the City of Philadelphia (J.S. 7-8) were neither required nor requested by the Will of Stephen Girard, and therefore have no place in the consideration of questions which involve the enforcement of the terms of that Will.

QUESTIONS PRESENTED.

1. Whether the appeal jurisdiction of this Court under 28 U. S. C. § 1257(2) is properly invoked where a state court pursuant to its historic nonstatutory powers removed a trustee who was unable to carry out the terms of a testamentary trust and the constitutional validity of the state statute allegedly involved was not raised in the lower state court.

2. Whether a substantial federal question is presented, warranting the grant by this Court of a petition for writ

of certiorari under 28 U. S. C. § 1257(3), where a state court removed, as trustee of a testamentary trust for the operation of a private school and orphanage for poor white male orphans, a city agency which this Court had held could not constitutionally administer the trust as directed by the testator.

3. Whether a substantial federal question is presented, warranting the grant by this Court of a petition for writ of certiorari under 28 U. S. C. § 1257(3), by the allegation that such a school and orphanage is a public institution subject to the restrictions of the Fourteenth Amendment, notwithstanding the amply supported findings of the state court that:

(*a*) the testator intended to establish a private charity;

(*b*) no legislation was requested by the testator or required for the fulfillment of his charitable purpose;

(*c*) the school and orphanage was built and has been maintained solely with the testator's funds;

(*d*) the school and orphanage is no different from any other private school.

STATEMENT OF THE CASE.

I. The Testator's Will.

Stephen Girard died on December 26, 1831, leaving a Will dated February 16, 1830, and two Codicils, respectively dated December 25, 1830 and June 20, 1831, copies of which documents will be found in Appendix A hereto, pages 51-84.

In making his testamentary gifts, Girard carefully differentiated between (*a*) public schools and private schools, (*b*) different races, and (*c*) outright gifts and

gifts in trust. Thus, in Clause I he gave his "black woman Hannah" her freedom and provided for the payment to her of $200 per year from the income of another gift. In Clause IV he made an *outright* gift of $10,000 to "the Comptrollers of the *public* schools for the city and county of Philadelphia" for use in one of the public school systems.[2] In Clause V he gave $10,000 to the City of Philadelphia *in trust* to use the income to purchase fuel for distribution among "poor white housekeepers and roomkeepers, of good character, residing in the city of Philadelphia."

In Clause VIII Girard gave $6,000 to trustees to purchase a suitable piece of ground and erect thereon a school partly for "poor male white children" and partly for "poor female white children" of Passyunk Township. In further clauses he conferred benefactions upon his relatives and other individuals, some by way of outright legacies and others in the form of trusts.

In Clause XIX he gave Louisiana property to the City of New Orleans, the proceeds to be used "to promote the health and general prosperity of the inhabitants of the City of New Orleans," but in the same paragraph directed that other Louisiana property and its proceeds should be held by the City of Philadelphia *in trust* for "the same uses and purposes hereinafter declared and directed of and concerning the residue of my personal estate."

This brought Girard to what he specifically called his "primary object"—the creation of an orphan establishment for poor white male orphans. In Clause XX of his Will, therefore, he recited his desire "to provide for such a number of poor male white orphan children, as can be trained in one institution, *a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds,*" and to this end devised his entire residuary estate to "The Mayor, Alder-

[2] Emphasis in Will is supplied.

men and Citizens of Philadelphia" (the then corporate name of the City), their successors and assigns, *in trust* for the purposes thereafter mentioned.

In Clause XXI he then directed that $2,000,000 of this trust fund be used to erect a "college" on his square of ground between High and Chestnut Streets and 11th and 12th Streets, in the City of Philadelphia. (By his second codicil the location was changed to a site which he had later purchased and on which the college was erected.) In the same Clause he (*a*) described the physical aspects of the building in great detail and provided for the selection and qualifications of a competent number of instructors, teachers, assistants and other necessary agents; (*b*) declared that as many poor white male orphans, between the ages of six and ten years as the residuary income should be adequate to maintain, should be admitted into the college, preference being given first to orphans born in the City of Philadelphia, secondly, to those born in any other part of Pennsylvania, thirdly, to those born in the City of New York, and lastly, to those born in the City of New Orleans; (*c*) provided that no orphan should be admitted until his guardian or other competent authority had, by indenture, relinquishment or otherwise, authorized the City or others appointed by it to enforce every proper restraint and to prevent relatives or others from interfering with or withdrawing such orphan from the institution; (*d*) provided that the orphans admitted into the college should be "there fed with plain but wholesome food, clothed with plain but decent apparel (no distinctive dress ever to be worn) and lodged in a plain but safe manner;" (*e*) stipulated that due regard was to be paid to their health, and that they were to have suitable exercise and recreation; (*f*) prescribed in detail the nature of the curriculum in which they should be instructed; (*g*) directed that scholars meriting it should remain in the college until they were fourteen to eighteen years old, after which they were to be bound out by or under the

City's direction to suitable occupations; and (*h*) enjoined that no ecclesiastic should ever hold or exercise any station or duty or be admitted to the premises.

Having also declared in Clause XX that, together with the provision for the poor male white orphans, he had sincerely at heart the welfare of the City of Philadelphia, and, as a part of it, was desirous of improving the neighborhood of the river Delaware, Girard bequeathed in Clause XXII, out of the residue of his personal estate, the sum of $500,000 in trust to pave Delaware Avenue and Water Street and to make certain other improvements in that part of the city. This clause suggested that the City obtain legislation in order to carry out these contemplated City improvements:

In Clause XXIII, $300,000 was bequeathed to the Commonwealth of Pennsylvania for internal improvement by canal navigation, conditioned upon the enactment of laws "to enable the constituted authorities of the city of Philadelphia to carry into effect the several improvements above specified;" *i.e.*, the paving of Delaware Avenue, etc.

In Clause XXIV Girard left the remainder of his residuary estate *in trust:* to apply the income to the further improvement and maintenance of the college, to enable the city to provide for a competent police force, and to improve the property and general appearance of the city. He stated that "To all which objects, the prosperity of the City, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year for ever—after providing for the College as hereinbefore directed, *as my primary object.*"

Girard also provided in Clause XXIV that if the city "shall knowingly and wilfully violate any of the conditions" in the Will, the said remainder of the residue should pass to the Commonwealth of Pennsylvania for the purposes of internal navigation, except that the income

from his real estate in the City and County of Philadelphia was to be forever applied to the maintenance of the college; and if the Commonwealth failed to apply this bequest and the prior bequest of $300,000 to the purposes mentioned, or failed "to pass the laws hereinbefore specified for promoting the improvement of the City of Philadelphia," the said remainder (subject to the same exception in favor of the college) should pass to the United States of America for the purposes of internal navigation. There was a provision in the same clause that the City should keep separate accounts of the trust funds, which were not to be used for any but the prescribed purposes; should furnish an annual report thereof to the legislature; and should publish annually in newspapers a concise account of the trusts and the condition of the college.

II. The Operation of the Orphan Establishment.

From the death of Stephen Girard until 1869, the trust estate was administered by the City of Philadelphia as trustee. By the Act of June 30, 1869, P. L. 1276 (53 Purd. Pa. Stat. §§ 16365-16370), the Board of Directors of City Trusts was established consisting of the Mayor, the Presidents of City Councils and twelve private citizens, none of whom received compensation. The administration of all trusts held by the City, including the trust for Girard College, was delegated by that Act to the Board, which has administered the trusts since that time.

The College was opened on January 1, 1848. It has been conducted in conformity with the purposes expressed in Girard's Will. Neither the State nor the City of Philadelphia nor any other public body has contributed any money or property for the support of the College. The Trustees of the College choose the teachers as well as all other persons in the management and operation of the trust estate, in conformity with the requirements of of Girard's Will. All expenses of whatsoever character

incurred in connection with the operation and maintenance of the College are paid exclusively from the trust fund set up by Girard. The employees of the trust are not employees of the City or of the public school district but of the trust estate alone. The public school authorities have no voice in the management of the College and orphan establishment.

III. The Present Controversy.

The present controversy had its origin in 1954, when the appellants filed petitions in the Orphans' Court of Philadelphia to compel the Board of Directors of City Trusts to admit the individual appellants, Foust and Felder, to Girard College. After lengthy hearings before the auditing judge he; and later the Orphans' Court *en banc,* dismissed the petitions, holding that to grant them would violate the express terms of Stephen Girard's Will. They stated that if the trustee City, acting through the Board of Directors of City Trusts, could not constitutionally carry out the terms of the trust for "poor white male orphans," as directed in the Will, then substituted trustees should be appointed who could carry out this primary object of the testator. 4 Pa. D. & C. 2d 671, 701-702 (1955); 4 Pa. D. & C. 2d 708, 714-715 (1956).

The Supreme Court of Pennsylvania affirmed; and it, too, explicitly stated that if the Board of Directors of City Trusts could not constitutionally carry out the terms of the trust for "poor white male orphans," then substituted trustees should be appointed who could so do. *Girard Will Case,* 386 Pa. 548, 566-568, 127 A. 2d 287, 295-296 (1956).

An appeal to this Court from the decision of the Supreme Court of Pennsylvania was dismissed; but, treating it as a petition for certiorari, this Court granted the petition and reversed and remanded the cause for further proceedings not inconsistent with its opinion. *Pennsylvania* v. *Board of Directors of City Trusts,* 353 U. S. 230 (1957). This Court held that the Board of Directors

of City Trusts was an agency of the Commonwealth of Pennsylvania and that therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the College because they were Negroes was discrimination by the State, forbidden by the Fourteenth Amendment. A petition for rehearing and presentation of oral argument was thereafter denied by this Court (*Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 989). On June 11, 1957 the Court issued its formal mandate, reversing the judgment of the Pennsylvania Supreme Court for the reason stated and remanding the cause for further proceedings not inconsistent with the Court's opinion (J.R. 79a).

On June 28, 1957 the Supreme Court of Pennsylvania entered an order vacating the earlier decrees of the Orphans' Court and remanded the cause to that court for further proceedings not inconsistent with the opinion of this Court (J.R. 44a). Mr. Justice Bell dissented, being of the opinion that the cause should have been remanded to the Orphans' Court with directions to remove the Board as trustee and appoint substituted trustees who would not be officers or employees of the Commonwealth, the City, or any agency thereof (J.R. 45a). Mr. Justice Musmanno dissented on the ground that in his opinion the mandate of this Court required that Foust and Felder should be forthwith admitted to Girard College (J.R. 49a).

Almost two months having thereafter elapsed without application by appellants for additional proceedings, the Orphans' Court on September 11, 1957 filed a further opinion and entered a further decree (J.R. 50a, 53a). In obedience to the mandate of this Court dated June 11, 1957 and the order of the Pennsylvania Supreme Court filed June 28, 1957, and in conformity with the Pennsylvania Supreme Court's suggestions with respect to removal contained in its opinion on the prior appeal, the Orphans' Court dismissed the petitions of Foust and Felder for admission to Girard College, removed the Board

of Directors of City Trusts as trustee upon appointment of a substituted trustee, directed the Board to transfer the records and assets of the estate to the substituted trustee when appointed and qualified, and ordered the Board to file an account of its administration of the estate within six months. 7 Fiduc. Rep. (Pa.) 555 (1957).

Appellants then filed petitions with the Orphans' Court asking reconsideration, vacation or modification of the decree of September 11, 1957, and praying that Foust and Felder be admitted to the College (J.R. 55a-73a). On October 4, 1957 the Orphans' Court entered further opinions and decrees denying these petitions (J.R. 74a-76a). At the same time it entered a decree appointing thirteen individuals as substituted trustees (J.R. 77a). The latter decree directed the substituted trustees to serve without compensation, appointed them for a period of three years or until such time as their successors should be appointed, and directed that those who were members of the Board of Directors of City Trusts should resign therefrom.

The appellants thereupon appealed to the Supreme Court of Pennsylvania from the Orphans' Court decrees of September 11, 1957 and October 4, 1957. The Supreme Court of Pennsylvania affirmed those decrees, Mr. Justice Musmanno dissenting. *Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844 (1958). In the course of its opinion, written by Mr. Chief Justice Jones, the Court held (*a*) that a testator has a constitutional right of property in the execution of his testamentary benefaction, and to deprive him thereof by appropriating a part of the gift to a purpose or person not intended would be a fraud on his generosity and an evasion of his private dominion; (*b*) that the orphanage as a private charity, not the trusteeship of the City, constituted the primary object of Girard's testamentary plan; (*c*) that the trust and the orphanage are private, not public; (*d*) that the statutes and ordinances which were urged by the appellants as

having made the trust a public one did not so operate, but were gratuitous, unnecessary enactments; (*e*) that the Orphans' Court acted within its inherent non-statutory chancery powers in removing the Board as trustee and substituting private individuals as trustees in order to carry out the testator's charitable object; (*f*) that the removal of the Board and the denial of individual appellants' petitions did not deprive them of any constitutionally guaranteed right; and (*g*) that appellants had not been denied due process of law.

On February 12, 1958, the Supreme Court of Pennsylvania denied appellants' petition for reargument. This appeal followed.

SUMMARY OF ARGUMENT.

This case involves the interpretation and enforcement of the Will of Stephen Girard, whereby he bequeathed certain property in trust to the City of Philadelphia to establish and maintain an orphan establishment for a named beneficiary class. Following the decision of this Court that the City as trustee could not constitutionally carry out the terms of the Will as directed, the Orphans' Court, under its historic equity powers, removed the City as trustee and appointed new trustees who were not under such an incapacity. The Orphans' Court further denied petitions for admission of the individual appellants because they were not within the beneficiary class named in the Will.

The beneficiary class so named is "poor male white orphans"; the individual appellants are poor male Negro orphans. For this reason, appellants have attempted to label this proceeding a "segregation" or "discrimination" case. They continue to do so in their Jurisdictional Statement to this Court, despite the Pennsylvania Supreme Court's statement that such labels can only serve to confuse and obscure the real issues involved (J. S. 41). Ap-

pellees submit that this case is not a "segregation" case but is purely a case involving the law of testamentary dispositions and charitable trusts and that the decisions of the Pennsylvania courts are fully and firmly grounded in state law.

Appellants' Jurisdictional Statement misstates, obscures and confuses the facts and issues which are presented to this Court. Appellees, believing that in a case such as this the starting point should be the Will which is under attack, have at the outset in their Statement of the Case summarized the pertinent portions of the Will and have appended the entire Will as Appendix A. An examination of the Will reveals many of the errors in appellants' statements.

The attempt to invoke this Court's jurisdiction by way of appeal is improper in view of the fact that the requirements of 28 U. S. C. § 1257(2) have not been met. The constitutional validity of a state statute was not raised in the Orphans' Court, and there was no decision in either Pennsylvania court in favor of the constitutional validity of a state statute, since the removal of the trustee was based on the inherent and historic equity powers of the Orphans' Court. Moreover, the alleged federal question presented to this Court arises not from the removal of the Board as trustee but from the dismissal of the petitions for admission of the individual appellants, which was based not upon statute but upon the Will of Stephen Girard.

In addition to the improper invocation of jurisdiction by way of appeal, the Commonwealth of Pennsylvania and the City of Philadelphia and its agencies have no standing in this Court to assert the alleged rights of the individual appellants and should therefore be eliminated from the proceeding. Likewise, appellants have no standing to present the sixth question in their Jurisdictional Statement (J. S. 11) raising the interests of the United States. That question was not considered by the Pennsylvania courts and is not ripe for decision at this time.

The petition for certiorari, which appellants request in the alternative, should be denied by this Court for want of a substantial federal question. The Pennsylvania Supreme Court decided the following questions of state law: (1) the primary and dominant object of Girard's Will is the college and orphan establishment for poor male white orphans, not the trusteeship of the City of Philadelphia; (2) the Orphans' Court has complete power and jurisdiction to remove a trustee who is incapable or fails or refuses to carry out a trust as its creator directed; (3) Girard College is a private charity, no legislation was requested or required to establish or administer it, and none could transform it into a public institution. These nonfederal grounds of decision should be accepted by this Court because they have fair and substantial support and were not made to evade any constitutional issue.

Finally, the enforcement by the Pennsylvania courts of the primary purpose of Girard's Will, thereby protecting the rights of the named beneficiary class, did not deny any rights of the individual appellants under the Fourteenth Amendment. The attempt by appellants to represent this case as an "unwitting blueprint" for evasion of the Fourteenth Amendment is completely without foundation. Girard College is not a public school. It is a private charity established and administered according to the will of a private individual, and maintained and supported entirely by private funds.

ARGUMENT.

I. The Jurisdiction of This Court Has Been Improperly Invoked.

A. This Court Has No Jurisdiction by Way of Appeal.

Appellants invoke the jurisdiction of this Court by way of appeal under 28 U. S. C. § 1257(2), alleging that the validity of Section 331(5) of the Fiduciaries Act of

1949, April 18, P. L. 512, § 331(5), 20 Purd. Pa. Stat. § 320.331(5) was drawn in question on the ground of its being repugnant to the Constitution of the United States and that the decision of the Pennsylvania courts was in favor of its validity.

This Court has no jurisdiction by way of appeal for the reason that the constitutional validity of the Fiduciaries Act of 1949 was not raised by any of the appellants in their Petitions for Reconsideration and Vacation or Modification before the Orphans' Court (J.R. 55a-73a). Although the individual appellants did attempt to raise this question in the Statement of Questions Involved in their brief before the Pennsylvania Supreme Court, that court made no express ruling on the constitutionality of the Act. Such a ruling was unnecessary in view of the settled state practice that questions not raised in the court below will not be considered on appeal. See, *e.g., Williams* v. *Masters, Mates & Pilots,* 384 Pa. 413, 421, 120 A. 2d 896, 900 (1956); *Bourd* v. *Berman,* 359 Pa. 183, 185, 58 A. 2d 442, 444 (1948). In view of the untimely presentation of this question to the Pennsylvania courts, this Court should dismiss the appeal for lack of jurisdiction. *Bailey* v. *Anderson,* 326 U. S. 203, 206-207 (1945); ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (1951 ed.), § 66.

Furthermore, the Pennsylvania courts found it unnecessary to make any decision on the constitutional validity of the Fiduciaries Act of 1949. The Orphans' Court in its opinion and decree of September 11, 1957 (J.R. 50a-54a) did not base its action on any statute but said:

> "It is a universally accepted rule of law that the disqualification or incompetency of a trustee shall not be permitted to defeat the purposes of a charitable trust, nor to impeach its validity, nor to derogate from its enforcement—the trustee must be fitted to

> the trust and not the trust to the trustee. We know of no decision of any court in the English-speaking world which challenges this rule of law. As a matter of fact, the Supreme Court of the United States, on two previous occasions in litigation dealing with the estate of the present testator, clearly indicated its adherence to this principle."

The Pennsylvania Supreme Court did refer to Section 331(5) of the Fiduciaries Act of 1949, in discussing the powers of the Orphans' Court (J.S. 47). However, it immediately went on to state as follows (*id.*):

> "*Over and above such statutory power,* it has long been established that the Orphans' Court possesses the power of a court of chancery in aid of an exercise of its jurisdiction: see *Stevens's Estate,* 200 Pa. 318, 322, 49 A. 985." (Emphasis supplied.)

The case of *Steven's Estate,* decided in 1901, set forth the inherent equity powers of the Orphans' Court with such clarity that the Supreme Court found it "presently so pertinent" as to justify quoting from it at length (J.S. 47-48).

The decisions of the Pennsylvania courts were therefore based upon a nonstatutory ground, not upon the statute which the appellants attempted to insinuate into this case for the first time in the Pennsylvania Supreme Court. There was no decision, nor was there any necessity for a decision, in favor of the validity of the Fiduciaries Act of 1949.

There are additional reasons why this Court has no jurisdiction by way of appeal. In the first place, the mere removal of the Board of Directors of City Trusts did not operate to deny any alleged constitutional rights of the individual appellants. Rather was it the dismissal by the Orphans' Court (J.R. 54a) of the individual appellants' petitions for admission to Girard College which provided

the occasion for them to allege the existence of the federal questions which they now urge upon this Court. That dismissal was not based upon any statute but upon the express terms of Stephen Girard's Will.

Further, appellants' position that the appeal should be entertained because they contend that the Fiduciaries Act of 1949 is involved in this proceeding extends far beyond the cases cited in their Jurisdictional Statement (J.S. 5-6), wherein appeals were allowed because the constitutional validity of a state statute as applied was raised and decided. In the last analysis virtually every decision by a state court is based upon some statute which gives the court authority to hear and decide an issue presented to it. If appellants' argument with respect to Section 331 of the Fiduciaries Act of 1949 were accepted by this Court, it would follow that most state court decisions, in which rights under the Fourteenth Amendment are raised, could properly come before this Court on appeal. Appellants' argument would, therefore, obliterate the distinction made by Congress between appeal and certiorari in Sections 1257(2) and 1257(3), 28 U. S. C.

B. The Commonwealth of Pennsylvania, the City of Philadelphia, Its Mayor and the Philadelphia Commission on Human Relations Have No Standing in This Court Either on Appeal or Certiorari.

The questions presented by appellants (J.S. 10-11), with the exception of the sixth question which will be discussed hereafter, are concerned solely with the alleged violation of the constitutional rights of the individual appellants by the refusal of the Orphans' Court to order their admission to Girard College. Whatever the status of the Commonwealth of Pennsylvania and the City of Philadelphia and its agencies may have been in the Pennsylvania courts with respect to the questions of state law decided there, no federal rights of these parties have been,

asserted in their Jurisdictional Statement, nor could such rights be successfully asserted.[3] This Court has held time and again that a party before this Court must have a direct personal interest in the federal question presented. See, *e. g.*, *Braxton County Court* v. *West Virginia*, 208 U. S. 192 (1908); *Oklahoma ex rel. Johnson* v. *Cook*, 304 U. S. 387 (1938). It is respectfully submitted that the above named parties should be eliminated from this proceeding.

C. This Court Has No Jurisdiction Either by Appeal or Certiorari to Consider the Sixth Question Presented by Appellants.

The sixth question presented by appellants (J.S. 11) raises the issue as to whether the appointment of new trustees impairs the rights of the United States under the residuary clause of the Will (Clause XXIV, App. 76). The injection of this question into the present case is completely without merit. The appellants have no standing to assert rights of the United States, nor did they properly present this question to the Pennsylvania Supreme Court for decision. Indeed, the Commonwealth of Pennsylvania, whose successor interest is prior to that of the United States, categorically stated in that court that the interest of the Commonwealth is not at issue in the present proceeding (Answer of Appellees to Appellants' Joint Petition for Reargument, pp. 7-8). As was said by the Orphans' Court in deferring action on the Commonwealth's petition with respect to its successor interest:

> "Under our well-established practice all such questions are heard at the audit of the fiduciary's account. Therefore, this petition is premature." *Girard Estate*, 7 Fiduc. Rep. (Pa.) 609, 610 (1957).

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[3] See *Williams* v. *Mayor and City Council of Baltimore*, 289 U. S. 36, 40 (1933); *Trenton* v. *New Jersey*, 262 U. S. 182 (1923).

For these reasons, the raising of this issue is frivolous, and this Court has no jurisdiction to consider it.

II. No Substantial Federal Question Is Presented Which Would Warrant The Grant of Certiorari.

A. The Decision of the Pennsylvania Supreme Court on Questions of State Law Rests on a Fair and Substantial Basis and Should Be Accepted by This Court.

Appellants' argument obscures the questions which are presented to this Court for decision. In order to place these questions in their proper perspective, the questions of state law which have been decided by the Pennsylvania Supreme Court must be examined. Such an examination demonstrates the constitutional propriety of the decision.

This Court has stated many times that it will accept the state law announced by the state court unless it is made to evade a constitutional issue or is without a fair or substantial basis. In *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540 (1930), the Court said:

> "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. * * * But if there is no evasion of the constitutional issue, * * *; and the non-federal ground of decision has fair support, * * * this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court."

This principle has been particularly recognized by this Court in the area of the regulation by the State of the manner and terms upon which property within its domain may be transmitted by will and the determination of who shall or who shall not be capable of taking. *Mager* v. *Grima*, 8 How. 490 (1850); *accord*, *United States* v. *Perkins*, 163 U. S. 625, 627, 628 (1896); *Maxwell* v. *Bugbee*, 250 U. S. 525, 536 (1919); *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562 (1942); *Demorest* v. *City Bank Co.*, 321 U. S. 36 (1944).[4]

In the light of the above principle, the following questions of state law decided by the Pennsylvania Supreme Court should be controlling in this Court, since they were not made to evade a constitutional right and they clearly have fair and substantial—indeed impregnable—support.

1. *The Ruling as to the Primary Object of the Testator's Bounty Was Completely Sound.*

The primary and dominant object of Stephen Girard's Will is the college and orphan establishment for "poor male white orphans" and not the trusteeship of the City of Philadelphia (J.S. 44). This proposition has clear support in the language of the Will and in cases decided by

[4] The last cited case involved an appeal from a New York decision passing upon the state Personal Property Law dealing with the apportionment of proceeds of a salvage operation between life tenant and remaindermen. Mr. Justice Douglas, with whom Mr. Justice Black joined, concurred on the ground that the appeal should have been dismissed at the outset, stating (321 U. S. at 49):

> "That is a question of New York law on which the New York court has the final say. It is none of our business—whether we deem that interpretation to be reasonable or unreasonable, sound or erroneous. *Sauer* v. *New York*, 206 U. S. 536, 545-548. And there is no suggestion here that state law has been manipulated in evasion of a federal constitutional right. *Fox River Paper Co.* v. *Railroad Commission*, 274 U. S. 651, 657; *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540. Consequently I can see no possible claim to substantiality of any federal question, whatever view may be taken of the due process clause. I would therefore dismiss the appeal."

this Court and the Pennsylvania Supreme Court dating back to 1844.

As to the terms of the Will itself, the testator clearly declared his dominant object. Clause XX of the Will (App. 61) recites, as an introduction to the devise of his residuary estate to support the trusts mentioned in the Will,

> "• • • I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds • • •."

In Clause XXI of the Will (App. 72), after contemplating that the sum of $2,000,000 might not be sufficient to build the buildings and support the college, he directed that such further sums as may be necessary shall be taken from the final residuary fund, his design and desire being

> "that the benefits of said institution shall be extended to as great a number of orphans as the limits of the said square and buildings therein can accommodate."

In Clause XXIV (App. 77) the City is given an interest in the income from the residuary trust

> "• • • after providing for the College as hereinbefore directed, as my primary object."

Obviously, with the express intent of the testator so clearly set forth, the primary object specified has been fully recognized by this Court and by the courts of Pennsylvania. *Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844 (1958); *Girard Will Case*, 386 Pa. 548, 568, 127 A. 2d 287, 296 (1956). The views expressed in those opinions were merely confirmatory of previous decisions.

In *Girard* v. *Philadelphia*, 7 Wall. 1, 12 (1868), Mr. Justice Grier, speaking for this Court, said:

> "• • • that the income of the whole residuary was devoted to the three objects stated by the testator, the college being the 'primary object,' and that so long as any portion of this residuary fund should be found necessary for 'its improvement and maintenance,' on the plan and to the extent declared in the will, the second and third objects could claim nothing."

See also *Vidal* v. *Girard's Executors*, 2 How. 127, 188 (1844).

The same recognition has been given to the primary purpose of the testator by the Pennsylvania courts. *Soohan* v. *Philadelphia*, 33 Pa. 9, 22 (1859); *Philadelphia* v. *Girard's Heirs*, 45 Pa. 9, 25 (1863).

2. *In Removing the City as Trustee the Pennsylvania Court Was Exercising Its Historic Equitable Power.*

The Orphans' Court has complete power and jurisdiction to remove a trustee who is incapable or fails or refuses to carry out a trust as its creator directed.[5] In

[5] Appellants intimate that the order of the Orphans' Court deprived them of procedural due process in violation of the Fourteenth Amendment (J. S. 21). In view of the fact that this allegation has not been included in the Questions Presented (J. S. 10-11), it is not properly before this Court for consideration. Rules 15(c)(1), 40(d)(2). The elimination of this issue from the Questions Presented (see Notice of Appeal, p. 4) is clear evidence that it has no substantial merit. However, in order to avoid any misapprehension on the part of this Court, it should be noted that the Pennsylvania Supreme Court expressly stated in its opinion (J. S. 55) that "the parties have been fully heard," referring to the extensive testimony taken before the Orphans' Court and the exceptions, arguments and other procedural steps allowed the appellants at every stage of the case. See Answer of Appellees to Appellants' Joint Petition for Reargument, pp. 1-5.

The appellants state that no party to the litigation had requested or ever suggested that the City of Philadelphia should be ousted as trustee—especially of the entire Estate (J.S. 36). The record shows, however (Cert. Tr. 65—oral argument before Bolger, *J.*) that the then City Solicitor recognized that the Court had two alternatives—removal of the governmental trustee and transfer of legal title to a private trustee, or removal of the restriction as to admission to Girard College.

removing the City of Philadelphia because of its incapacity to carry out the terms of Stephen Girard's will, the Court was exercising the historic power of a court of chancery. It was doing nothing novel or applying to the present situation any law different from what the courts of Pennsylvania had applied from the time of the founding of the province. As stated by the Supreme Court of Pennsylvania (J.S. 47-48):

> "Over and above such statutory power, it has long been established that the Orphans' Court possesses the power of a court of chancery in aid of an exercise of its jurisdiction: see *Stevens's Estate*, 200 Pa. 318, 322, 49 A. 985. What was said there in the opinion of the court below, whereon this court affirmed *per curiam*, is presently so pertinent as to justify the following quotation: 'The courts of Pennsylvania have looked with favor upon charities, and the law of the state, as administered from the beginning of this province, has always been broad enough to discern the objects of every charity and to preserve and enforce it, notwithstanding any defect, such as want of power in the trustees or otherwise: The Apprentices' Fund Case, 13 Pa. C. C. Rep. 241. Therefore, when a charity is established in any manner, such a slight impediment as a defect or want of power in the trustee to execute it does not stand in the way; the charity remains; the trustee is declared incapable of acting, and a competent trustee is appointed in his place. Chancery here steps in to enforce it and commits it to some one who may lawfully administer it: Frazier *v.* St. Luke's Church, 147 Pa. 256'."

This Court itself in dealing with Stephen Girard's Will recognized the same principle of law. In *Vidal* v. *Girard's Executors*, 2 How. 127 (1844), wherein the heirs of Stephen Girard among other things unsuccessfully attacked the capacity of the City of Philadelphia to act

as trustee, this Court, speaking through Mr. Justice Story, said (p. 188):

> "But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust."

This view was reiterated in *Girard* v. *Philadelphia*, 7 Wall. 1, 12 (1868).

Appellees submit that no inference can be drawn that the courts of Pennsylvania in this case were applying new or unusual state law or in any way attempting to avoid constitutional limitations by "patterning" state law to this case. The action of the court clearly has such a fair and substantial basis that its decision thereon should be accepted by this Court.

Under the laws of Pennsylvania the trust for Girard College is a private trust and the institution is a private college and orphan establishment. That this view of the Pennsylvania Supreme Court was not taken to evade a constitutional issue but is founded on a fair and substantial basis will be hereinafter demonstrated.

B. Stephen Girard's Orphan Establishment is a Private Charitable Institution and Has Not Become a Public School.

The Pennsylvania Supreme Court found that Girard College is not a public institution, but, on the contrary, is a private charitable school and orphan establishment. On this point the Court said:

> "The testator's primary and dominant object was to found a private charitable institution for the training, education and maintenance of poor male white orphans." (J. S. 44).

"It is not possible to read Girard's will without being deeply impressed with the fact that it was *the College, as a private charity,* and *not the trusteeship of the City,* that was the primary object of the donor's testamentary scheme." (J. S. 44). (Emphasis by the Court.)

"The statutes and ordinances which the appellants urge as having made a public trust of Girard College did not so operate." (J. S. 45).

This decision of the Pennsylvania Court, rejecting the claims which are here advanced by appellants, was based on principles of state law—the construction of a Pennsylvania citizen's will, the administration of a trust established by his will, and the interpretation and significance of Pennsylvania statutes.

The construction of private trust instruments, and the characterization for constitutional law purposes of interests vested thereunder, are matters of state law, *Nickel* v. *Cole,* 256 U. S. 222, 225 (1921), as are questions of the propriety of probate proceedings, *Bilby* v. *Stewart,* 246 U. S. 255 (1918), and the duties of a trustee, *Rockhold* v. *Rockhold,* 92 U. S. 129 (1875). It is respectfully submitted that the finding as to the private nature of Girard College is fully supported by the previously established law of Pennsylvania and of this Court, and by the uncontroverted facts.

The appellants make broad and unsubstantiated claims that the trust for Girard College is a public trust or public institution and municipal property. They avoid advising the Court when and how, under recognized legal principles, it became such and in what sense it is "public."

The phrase "public institution" has a number of meanings; for example, the trust for Girard College is "public" in the sense that it is for a charitable purpose. However, "all charities are in some sense public. If a trust is for any particular persons, it is not a charity.

Indefiniteness is of its essence." *Philadelphia* v. *Fox*, 64 Pa. 169, 182 (1870). Again, the trust for Girard College is "public" in the sense that it provides education in relief of the taxpayers.

The determinative meaning of public institution in the setting of the Federal Constitution, however, is that the institution is an arm of the State or subject to sweeping control and direction by the State. Girard College is not and never has been a public institution within this meaning.

That a trust such as that created by Stephen Girard for Girard College has always been recognized by Pennsylvania law as a private charity is perhaps most clearly set forth in the case of *Brown* v. *Hummel*, 6 Pa. 86 (1847). That case involved an attempt by the Pennsylvania legislature to alter the terms of a will establishing a perpetual trust for the education of orphans in an orphan establishment. In holding that the legislature utterly lacked the power to change the directions of the testator, the Court said:

> "George Fry, by this will, constituted a private charity, which was regulated throughout by the minutest rules for its dispensation and government. It was *his* charity and benevolence, and not the charity and benevolence of the state, or anybody else." *Id.* at 92. (Emphasis by the Court.)
>
> "The estate was the property of George Fry, dedicated by him *not to the public*, but to a charity limited in its design and operation and sphere, to be conducted by the rules *he* prescribed, and not by general or special law." *Id.* at 92. (Emphasis by the Court.)
>
> "If the legislature, by *ex parte* enactment, can alter the will of a private individual, whose will shall escape? On whose will shall the hand of legislative innovation next be laid? It is the principle and not the individual instance that is to be considered. What private charity will next be disturbed and invaded?

The will of Stephen Girard offers a conspicuous mark." *Id.* at 94.

The decision in *Brown* v. *Hummel, supra,* is in accord with the holding of this Court in *Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. 518 (1819). The several opinions delivered therein established the principle that an educational institution, founded and maintained with private funds, is a private charity, and cannot be expropriated by the State and made into a public institution. *E. g., id.* at 633, 634, 636 (Marshall, C. J.); *id.* at 660, 665 (Washington, J.); *id.* at 671-72, 697-98 (Story, J.)

1. *The Uncontroverted Facts Establish the Private Status of Girard College.*

That Girard intended to create a private institution is clear from the terms of his Will. In Clause IV of the Will he made a gift specifically for the "public schools" (App. 52). However, when he created the trust for Girard College, he prefaced the bequest with the expression of his desire "to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds" (App. 61).

There can be no question that Girard had the right to establish a private charity and to limit the beneficiaries of that charity to a specific class; the world is too large and its people too many to permit per capita beneficence for all who might deserve it.

The private character of Girard College is further established by the following uncontroverted facts:

1. Girard College was erected on land bequeathed by Stephen Girard and in accordance with the meticulous directions set forth in Clause XXI of the Will and the Codicil thereto (App. 62, 82).

2. No State or City funds or property have ever been used for the support and maintenance of Girard College.

3. The staff and teachers of Girard College are selected in conformity with the provisions of Clause XXI, paragraph 2, of the Will (App. 68). The salaries of these employees are paid solely out of the trust estate. The teachers of Girard College are not subject to the control of the Board of Education of the City of Philadelphia, which has charge of the City public school system.

4. The basic curriculum of study in Girard College is specifically prescribed by Clause XXI, paragraph 7, of the Will (App. 70).

5. The selection of the students to be admitted to Girard College is made on the basis of their birthplace rather than their place of residence at the time of admission. The priority in the selection of students is, first, those born in the City of Philadelphia; secondly, those born in any other part of Pennsylvania; thirdly, those born in the City of New York; and lastly, those born in the City of New Orleans (Clause XXI, paragraph 6; App. 69).

6. The orphans are fed, clothed and housed on the College grounds at the expense of the trust estate.

7. All the Philadelphia real estate of the Girard College trust is taxed by the City, except for the College grounds and buildings, which property shares a statutory exemption in common with all other charities, including non-profit private schools (Cert. Tr. 476-477).

The above facts demonstrate beyond any question that the Girard College trust is, as it was intended to be, a

private charity established for the purpose of supporting and maintaining a private college and orphan establishment.

The appellants, however, not being able to challenge the above facts, make the broad claim that Girard College is a public institution. Their contentions will be answered seriatim.

2. *No Legislation Did or Could Make Girard College a Public Institution.*

The statutes and ordinances printed in Appendix B to the Jurisdictional Statement (J.S. 83 *et seq.*) were urged by appellants before the Pennsylvania Supreme Court as being required by Girard's Will and necessary to put the trust for the College in operation. That argument was rejected *in toto* by the Supreme Court of Pennsylvania, speaking through Mr. Chief Justice Jones, as follows (J.S. 45-46):

> "The statutes and ordinances which the appellants urge as having made a public trust of Girard College did not so operate. Certain it is that no additional legislation was required to clothe the City with the fiduciary powers necessary for the administration of Girard College. * * * [Quotation from *Vidal* v. *Girard's Executors*, 2 How. 127 (1844), omitted.] The legislative enactments which the appellants stress were designed in large part to enable the Commonwealth and the City to receive and use for their governmental purposes pecuniary legacies bequeathed directly to them by Girard's will. The rest of the legislative enactments were purely administrative measures neither envisioned nor required by Girard's will. And, the same can be said for the ordinances which the appellants cite."

The terms of the Will and the Pennsylvania law support fully the above holding that:

(1) Stephen Girard's Will neither specified nor requested the enactment of any legislation with respect to Girard College; and

(2) no legislation was required or necessary in order to give effect to the Girard College trust.

There is no basis in Girard's Will for the proposition that he required, requested, intended or contemplated that the Pennsylvania legislature should enact statutes with regard to the establishment and operation of Girard College. Legislation is mentioned by Stephen Girard only in Clauses XXII and XXIII of the Will (App. 72-76). In Clause XXII he requests legislation to enable the City to carry out the improvements specified therein, viz., the paving of public streets, the tearing down of wooden houses, and the like, none of which had anything to do with the trust for Girard College. In Clause XXIII he conditions a separate bequest to the Commonwealth of $300,000 upon the enactment of such legislation. Nowhere else in his Will did Girard ask for, suggest or require legislation of any kind.

None of the statutes in question was necessary in order to carry out the provisions in Girard's Will for the establishment and operation of the College. In *Vidal* v. *Girard's Executors*, 2 How. 127, 191 (1844), after finding that the City had power under the law of Pennsylvania to take property upon trust for charitable purposes, this Court said with respect to the Act of March 24, 1832, P. L. 176, and the Act of April 4, 1832, P. L. 275:

> "No doubt can then be entertained, that the legislature meant to affirm the entire validity of those trusts, and the entire competency of the corporation to take and hold the property devised upon the trusts named in the will."

Thus, it is clear that the above cited Acts were entirely unnecessary to vest power in the City to act as trustee for the College.[6]

Appellants contend that, in order to effectuate Clause XXI, paragraphs 5 and 9, of the Will (App. 69, 70), it was necessary for the legislature to enact the Act of February 27, 1847, P. L. 178, 53 Purd. Pa. Stat. §§ 16339-16344, as supplemented and amended by the Acts of April 20, 1853, P. L. 624, § 6, 53 Purd. Pa. Stat. § 16345, and May 23, 1887, P. L. 168, 43 Purd. Pa. Stat. § 81. From this contention they draw the inference that Girard intended such legislation. These Acts covered the binding into the College and the binding out of "poor white male orphans," and declared the City to be the guardian of such orphans at the College. They were not called for by Clause XXI of the Will, nor were they necessary to accomplish Girard's purposes. Under the common law of Pennsylvania, guardians, parents, or the surviving parent or next of kin of a minor child could relinquish to a third party the custody and control of such minor by indenture, provided such action was for the beneficial interest of the minor. *Enders* v. *Enders,* 164 Pa. 266, 30 A. 129 (1894); *Book's Estate,* 297 Pa. 543, 147 A. 608 (1929); *Dougherty Adoption Case,* 358 Pa. 620, 58 A. 2d 77 (1948).

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[6] The Act of March 24, 1832, P. L. 176 (printed in full in Appendix B hereto, pages 85-93), is concerned with the improvements mentioned in Clause XXII of the Will. Those improvements—none of which has anything to do with Girard College—are treated in detail in the first nine sections of the Act, which sections appellants disingenuously omit from their excerpt of the statute (J. S. 86). In their Statement of the Case (J. S. 14), they go further in their disingenuousness and omit from their quotation of Section 10 the following operative words: "which are the subjects of the preceding parts of this act, and to enable the constituted authorities of the city of Philadelphia to carry which into effect the said Stephen Girard has desired the legislature to enact the necessary laws." Section 11 (mistakenly cited by appellants as Section 2) of this Act, dealing with the method by which streets might be opened, was neither requested nor required by Stephen Girard but was a purely voluntary act on the part of the Commonwealth.

The appellants argue that, since the Act of 1847, *supra* (J. S. 87), constitutes the City as guardian of the orphans in Girard College, state participation in the administration of the College continues even after the removal of the City as trustee.

Stephen Girard at no place in his Will mentions any guardianship by the City such as is set up under Section 3 of the above cited Act. Moreover, it is obvious from a reading of the Act itself that the City's guardianship was only to be concurrent with its trusteeship of the Girard College trust. For example, the first paragraph of the Act provides for the consent of a mother, guardian, etc., to bind a "poor white male orphan child" by indenture "to the mayor, aldermen and citizens of Philadelphia, *as trustees under the will of Stephen Girard.*" (Emphasis supplied.) The entire Act shows that the guardianship set up under Section 3 deals solely with poor white male orphans who are under indenture to the City as trustee.[7]

Once the City, acting through the Board of City Trusts, has been removed as trustee, its guardianship likewise ceases. Upon the filing of its accounts as guardian before the Orphans' Court, it can be removed and new guardians appointed. *Burns Estate,* 2 Pa. D. & C. 2d 579 (O. C. Phila. 1955). This jurisdiction over the guardianship of Girard College minors as found in *Burns Estate* is in no respect different from that exercised by the Orphans' Court with respect to the general fiduciary duties of the Board of City Trusts. In *Wilson* v. *Board of Directors of City Trusts,* 324 Pa. 545, 188 A. 588 (1936), it was contended that, in view of the Act of June 30, 1869, P. L. 1276, 53 Purd. Pa. Stat. §§ 16365-16370 (J.S. 83), the Orphans' Court did not possess plenary power over trusts

[7] With regard to the Act of 1847, appellants find themselves in the anomalous position of relying upon a statute which by its express terms applies only to "poor male white orphan" children. In view of the earlier decision of this Court in this case, that Act is of questionable constitutional validity.

administered by the Board, including that for Girard College. In answer to this, the Court said (324 Pa. at 554, 188 A. at 593):

> "While the board of judges of the common pleas court appoints the trustees, the orphans' court possesses exclusive control over them in the conduct of testamentary trusts. They are, as to the orphans' court, in the same situation as other trustees amenable to them."

Such power of the Orphans' Court was reaffirmed by the decision in the instant case (J. S. 48).

Appellants contend that various other state contacts with Girard College will continue to exist, notwithstanding the removal of the Board of City Trusts as trustee, because of various statutory duties imposed on certain City officials (J.S. 11, 16-17, 33). This contention ignores the fact that under all the legislative enactments cited by appellants, the duties thereby enjoined exist only with regard to trusts of which the City, through the Board of City Trusts, is acting as trustee. Act of June 30, 1869, P. L. 1276, 53 Purd. Pa. Stat. §§ 16365-16370; Philadelphia Home Rule Charter, Section 6-400 (c).

Nowhere under the Act of 1869 or the Charter is Girard College mentioned. These enactments by their terms apply generally to all trusts administered by the Board. For example, under the Act of 1869 the City Treasurer is designated Treasurer of the Board of Directors of City Trusts, not "Treasurer of Girard College," as is incorrectly stated by the appellants (J.S. 17).

The Act of 1869 created the Board of Directors of City Trusts and transferred to it, for the purposes of administration, all trusts vested in the City as Trustee. As found specifically in *Wilson* v. *Board of Directors of City Trusts*, 324 Pa. 545, 188 A. 588 (1936), and as reaffirmed by the opinion of the Pennsylvania Supreme Court in the instant case (J.S. 48), the Act of 1869 in no

way divested the Orphans' Court of jurisdiction over the Board of City Trusts as trustees for Girard College.

With the removal of the Girard College trust from the control of and administration by the Board of City Trusts,[8] the duties and visitorial powers prescribed by the Act of 1869 and the Charter ceased to have any application to the College.

It should be noted that Stephen Girard neither requested nor required any of the above legislation. He did direct in Clause XXIV of his Will (App. 78) that the City as trustee should render annually to the State Legislature a detailed account concerning the Estate and a report on the condition of the College, and should submit books and accounts to a legislative committee if the same were requested. But this does not make Girard College a public school, as is demonstrated by the fact that the Commonwealth exercises extensive control and visitation over private schools of all kinds.[9] If the mere requirement

[8] Appellants attempt further to cloud the issues in this case by raising a question as to the scope of the Orphans' Court decree (J. S. 11). The substituted trustees have been appointed to administer only the trust for Girard College and no other trust in the Estate of Stephen Girard. The decree is to be read in the light of the issues which were before the Court. *E.g., Vicksburg* v. *Henson*, 231 U. S. 259, 269 (1913). Those issues related only to the trust for Girard College.

[9] Private schools, including Girard College, are subject to provisions of Title 24 of *Purdon's Pennsylvania Statutes* which require compulsory attendance of certain minors at schools where instruction is given, in the English language, in subjects and activities prescribed by the State Council of Education, § 13-1327; require reports on enrollment, attendance, and withdrawals, § 13-1332; and prescribe subjects of instruction, §§ 7-771, 15-1511, 15-1515, 15-1518. In addition, with respect to various other types of private schools, the statutes provide for licensing, approval of courses, regulation of standards of instruction, qualifications of teachers, equipment, financial resources, etc.; and for visitation by various state boards of: private trade schools, §§ 1725.1-1725.11; colleges, §§ 2421–2425; academies, §§ 2511–2514; private academic schools §§ 2731–2743; private business schools, §§ 2751–2760; correspondence schools, §§ 2771–2783; and private driver education or training schools §§ 2831-2845.

of reports to the Legislature makes Girard College a public institution, there can be no such thing as a private school in the entire Commonwealth.

3. *The Limited Tax Exemption Enjoyed by Girard College Is Granted to All Private Charities.*

Appellants point to the real and personal property tax exemption enjoyed by Girard College. They argue therefrom that the College is subsidized by the public authorities to the extent of the exemption, and must therefore be considered a public institution or a public school.

Under Pennsylvania law, Girard College, in enjoying this exemption, differs in no respect from any other charity or private non-profit school. Private school buildings and grounds are exempt from real estate taxes if the school is established for a charitable purpose and is administered without profit. *Hill School Tax Exemption Case,* 370 Pa. 21, 87 A. 2d 259 (1952). Nor does it matter that the charity is limited to a definite group or class. *Burd Orphan Asylum* v. *School District of Upper Darby,* 90 Pa. 21 (1880).

With respect to personal property taxes, appellants' Exhibit No. 18 (Cert. Tr. 662) indicates the amount which the Girard College trust would be required to pay to the School District and to the City of Philadelphia if it were not exempt from such taxes. This exemption enjoyed by the College is granted in like measure to all trust estates for non-profit religious, charitable or educational organizations. Act of June 17, 1913, P. L. 507, § 1, as amended, 72 Purd. Pa. Stat. § 4821; Act of May 23, 1949, P. L. 1676, § 2, as reenacted and amended, 24 Purd. Pa. Stat. § 581.32.

It appears from the typewritten transcript (Cert. Tr. 474 *et seq.*) that the Girard College trust, a private charity, is assessed by and pays substantial real estate taxes to the City of Philadelphia on all of its real estate outside the College grounds. The same transcript reveals

(and it is an obvious fact) that the City does not levy any tax on real estate which it owns (Cert. Tr. 476). Yet appellants claim that Girard College is a public institution and is owned by the City of Philadelphia. The anomaly of their position is apparent.

4. *The City's Trusteeship Did Not and Could Not Transform Girard College into Public or Municipal Property.*

Appellants appear to advance the startling proposition that a gift to a municipality in trust for charitable purposes vests in the municipality, under Pennsylvania property law, complete ownership of the trust estate, both legal and beneficial, and that the trust *res* thereby becomes public or municipal property. The cases cited by the appellants stand for no such proposition.

The primary beneficiaries of the trust estate are poor male white orphans, with priority for those born, first, in the City of Philadelphia, then the Commonwealth of Pennsylvania, the City of New York and, finally, the City of New Orleans. If the appellants are correct in their theory that the public, rather than those designated beneficiaries, are the beneficial owners of the trust *res* for Girard College, then every decision on Girard's Will by this Court and the courts of Pennsylvania since *Vidal* v. *Girard's Executors*, 2 How. 127 (1844), is meaningless.

The appellants' argument runs counter to the established rule of law that a municipality "assumes the same burden and is subject to the same regulations that appertain to other trustees of such trusts. The duty to administer the donation or charitable fund agreeably to the expressed wish of the donor or testator will be enforced in equity." 10 McQUILLIN, MUNICIPAL CORPORATIONS (3d ed. 1950), § 28.25. See also *Wilson* v. *Board of Directors of City Trusts*, 324 Pa. 545, 188 A. 588 (1936). It is equally well established that, if a municipality is incapable of acting as

trustee of a charitable trust, the municipality will be removed as trustee and new trustees appointed. *Vidal* v. *Girard's Executors, supra; Girard* v. *Philadelphia*, 7 Wall. 1 (1868); 10 McQUILLIN, *op. cit.*, § 28.36.

A further argument of appellants with respect to the trust estate being public or municipal property is based upon the theory that, since the estate has grown during the City's trusteeship of 127 years from $2,000,000 to $100,000,000, it has become "infused" with "a governmental and public character which now cannot be eradicated by decree" (J.S. 32). It is submitted that no fiduciary can, by the passage of time, obtain an interest adverse to a trust estate in its hands, nor can it change the legal character of the trust by judicious management.

In support of their conclusion that Girard College is public property, the appellants cite the case of *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (4 Cir.), *cert. den.*, 326 U. S. 721 (1945). However, the difference between the operative facts in that case and the present case merely emphasizes the weakness of appellants' position. Enoch Pratt intended, as Stephen Girard did not, to establish a public institution. Pratt's gift was for the benefit of "our whole City," "rich and poor, without distinction of race or color * * *" 54 F. Supp. 514 at 520, 525 n. 2 (D. Md. 1944). The Court of Appeals found that his purpose was "to create an institution which would belong to the City of Baltimore and serve all of its people" 149 F. 2d at 215. Equally important, and directly contrary to the facts in this case, Pratt gave the Library to Baltimore on the express condition that the City would create a perpetual annuity for maintenance. By the time of the suit, the City's contributions exceeded $800,000 per annum. *Id.* at 216. It was not the funds of Pratt but rather state money which continued "to supply it with the means of existence." *Id.* at 219.

When all is said and done, the City's contribution to Girard College reduces itself to free management services by the Mayor and President of City Council who, together with twelve other public-spirited citizens, comprise the Board of Directors of City Trusts. Stephen Girard did not direct that City officials serve without compensation. All costs of administration have been and are borne by the Estate of Stephen Girard. The citizen members of the Board of Directors of City Trusts serve without compensation. There is no showing that the City officials received any additional compensation from the City for performing their functions with regard to Girard College or that the services performed were such as to interfere with the performance of their official duties. Moreover, the service of public officials as ex officio trustees is by no means an unusual practice with regard to private eleemosynary institutions. See, *e. g.*, *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 648-9 (1819).

To contend, as do appellants, that Girard College not only was but still is a public institution "because the 'new' trustees include the majority of the appointed members of the Board [of City Trusts]" (J.S. 11), is frivolous. This argument assumes that public-spirited citizens who, voluntarily and without compensation, serve the City in the administration of a charitable trust thereafter remain government agents for all purposes and for all times and that any subsequent action of theirs is "State action." Such a contention could scarcely be made even with regard to a compensated full-time employee of the City after he leaves the City's service. In designating the new trustees of Girard College, it was obviously proper for the Orphans' Court to select some individuals who had experience with the affairs of Girard College.

In summary, Stephen Girard intended to establish his College for orphans as a private charitable institution. This he had a right to do. The Commonwealth could not derogate from Girard's right or the rights of his beneficiaries

by legislation, nor do the statutes which Pennsylvania enacted with regard to Girard College, being purely administrative measures, detract from those rights. The character and operation of the College, from its founding down to date, have borne all the earmarks of a private institution. There is no factor which differentiates Girard College from other private charities and schools[10] in Pennsylvania aside from the trusteeship of the City. This single factor, as has been shown above, does not make Girard College a public institution or subject it to the unlimited control of the state.

C. The Enforcement of the Primary Purpose of Stephen Girard's Will by the Removal of the City of Philadelphia as Trustee of the Girard College Trust Does Not Violate the Fourteenth Amendment.

The prior appeal to this Court and the instant appeal present two separate and distinct Fourteenth Amendment questions which appellants persist in confusing. The prior appeal involved the individual appellants' constitutional immunity from discrimination by the State. The present appeal seeks to establish an alleged right of the individual appellants to share in the bounty of Stephen Girard on an equal basis with the beneficiary class designated by him. No citizen of the United States has such a right. It is submitted the Pennsylvania Supreme Court properly determined that the action of the Orphans' Court in removing the City as trustee of the Girard College trust denied no individual rights protected by the Fourteenth Amendment but merely eliminated that element in the operation of Girard College which this Court found to be unconstitutional.

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[10] In Pennsylvania in 1950, there were 927 elementary and 248 secondary non-public schools. STATISTICAL ABSTRACT OF THE UNITED STATES (1953 ed.), p. 119. Some of these were chartered under special acts of the Legislature. *E. g.*, Episcopal Academy, Act of March 29, 1787, 12 Pa. Stat. at Large 479.

Appellants' entire argument that the removal of the City as trustee violates the Fourteenth Amendment and the mandate of this Court on the prior appeal rests upon two alternative and overlapping fallacious assumptions: (1) that this Court held that the individual appellants have a "constitutional right to attend Girard College"; and (2) that Girard College was and remains a public institution. The first assumption will be analyzed below. The second has been treated above at pages 24-39, where it is made clear that, in spite of the City's trusteeship, Girard College always has been a private institution. Once the fog created by appellants' fallacious assumptions is lifted, the basic issues involved in the instant appeal stand out clearly. Those issues are the freedom of testamentary disposition, the independence of private charities, and whether or not the Fourteenth Amendment in fact guarantees the rights claimed by appellants.

1. *The Effect of This Court's Prior Decision.*

On the prior appeal, this Court held only that the Board of City Trusts as an agency of the State of Pennsylvania could not constitutionally administer a charity the beneficiaries of which are limited to individuals of a particular race. The Will's limitation that those admitted to the College be "poor white male orphans" was quoted. Nonetheless, this Court did not hold, nor did it suggest, that that limitation was invalid or that applicants not coming within the named beneficiary class were entitled to admission. To the contrary, this Court stated quite clearly:

> "The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment." 353 U. S. at 231.

That language, it is respectfully submitted, does not constitute an adjudication that the individual appellants, who are not within the named beneficiary class, have a "constitutional right to attend" an institution founded and financed entirely with private funds pursuant to the explicit terms of an individual's will.

There is no indication in the opinion that this Court intended to limit in any way the right of a testator to select his beneficiaries and the right of those beneficiaries alone to enjoy his bounty. This Court has always been careful to point out that the Fourteenth Amendment does not apply to the action of private persons.

> "Since the decision of this Court in the *Civil Rights Cases*, 109 U. S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948). See also *Barrows* v. *Jackson*, 346 U. S. 249, 253 (1953).

The prior appeal presented a distinctly different conflict from that which is now before this Court. The present appeal involves the adverse claims of private individuals —the individual appellants and the designated beneficiaries represented by the substituted trustees—to the Girard College trust. By contrast the prior appeal set in opposition the rights of citizens and the power of the State. By the very act of establishing a public school system, *Brown* v. *Board of Education*, 347 U. S. 483 (1954), or a golf course, *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955), a State creates in its citizens the right to enjoy those facilities on equal terms. In the *Brown* case, this Court said, "Such an opportunity, ***where the state has undertaken to provide it***, is a right which must be made available to all on equal terms." 347 U. S. at 493 (emphasis supplied).

This Court articulated the underlying rationale in *Strauder* v. *West Virginia*, 100 U. S. 303, 307-308 (1879):

> "* * * The words of the [Fourteenth] amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

It was the imposition by the State of just such a badge of inferiority which this Court found to violate the Fourteenth Amendment in the *Brown* case, 347 U. S. at 494. The similarly disparate treatment of its citizens by an agency of the State, even as a trustee, was the unconstitutional element in the operation of Girard College. That discrimination by the State ceased with the removal of the City as trustee.

The removal of the City as trustee was necessary, not only to eliminate the state discrimination found on the prior appeal, but also to protect the rights of admission of eligible "poor white male orphans," whom Stephen Girard selected as the beneficiaries of the Girard College trust. In light of the decision of this Court on the prior appeal, the City as trustee could no longer uphold the integrity of the Will and protect the interests of the named beneficiary class. Since there are more eligible poor white male orphans than can be admitted to Girard College,[11] for every Negro orphan admitted one member of the

[11] The Pennsylvania courts have specifically found that, "There is no shortage of poor white male orphans between the ages of six and ten; on the contrary there are more qualified applicants than can be accommodated." *Girard Will Case*, 386 Pa. 548, 570, 127 A. 2d 287, 297 (1956).

beneficiary class selected by Stephen Girard will be denied admission.

To continue the City as trustee, with the requirement that it not refuse admission to Negroes, would deprive members of the named beneficiary class of their established rights, solely by reason of their race, in violation of the Fourteenth Amendment. In such circumstances, to paraphrase *Barrows* v. *Jackson*, 346 U. S. 249 (1953), and *Shelley* v. *Kraemer*, 334 U. S. 1 (1948): "Solely because of their race," poor white male orphans "will be unable to • • • enjoy" their inheritance "on the same terms as" legatees of other testamentary benefactions. "Denial of this right by state action [*i. e.*, the continuance of the City as trustee] deprives such" poor white male orphans, "unidentified but identifiable, of equal protection of the laws in violation of the Fourteenth Amendment." 346 U. S. at 254. "The difference between judicial enforcement and non-enforcement of" the City's trusteeship "is the difference to" poor white male orphans "between being denied rights of property [*i. e.*, the right of named beneficiaries alone to take their bequests] available to other members of the community and being accorded full enjoyment of those rights on an equal footing." 334 U. S. at 19.

Thus in removing the City as trustee the Orphans' Court was constitutionally fulfilling its primary purpose for existence, namely, to protect the estates of decedents and the rights of their beneficiaries to due process and the equal protection of the laws.

2. *The Principle of* Shelley *v.* Kraemer *Does Not Support Appellants' Position.*

(a) Individual Appellants as Citizens Have No Rights in the Estate of Stephen Girard.

Notwithstanding the fact that, as shown above, *Shelley* v. *Kraemer* and *Barrows* v. *Jackson, supra,* support the action of the Orphans' Court, appellants attempt to

invoke those decisions as a basis for their contention that the removal of the City as trustee violated the Fourteenth Amendment. Those cases held that the Fourteenth Amendment renders racially restrictive covenants on real estate unenforceable either in equity or at law. In both opinions, however, this Court stated that the Fourteenth Amendment does not make such covenants *per se* invalid or prevent voluntary adherence thereto. 334 U. S. at 13; 346 U. S. at 253. At the same time, this Court also pointed out that there was involved the constitutionally protected "right to acquire, enjoy, and dispose of property" to which Negroes are entitled "on an equal footing" with all other members of the community. 334 U. S. at 10, 19; 346 U. S. at 254.

Shelley held that court enforcement of such covenants by injunction violated the Fourteenth Amendment because the State thereby made available to private persons "the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willingly and financially able to acquire *and which the grantors are willing to sell.*" 334 U. S. at 19 (emphasis supplied). *Barrows* held that court enforcement of such covenants by awarding damages for breach violated the Fourteenth Amendment because the necessary result was that "*a prospective seller* of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur. Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians." 346 U. S. at 254 (emphasis supplied).

The state judicial action in those cases violated the Fourteenth Amendment only because it operated to prevent, as in *Shelley,* or effectively to deter, as in *Barrows,* a property owner from selling to a Negro, thereby impinging upon the latter's constitutionally protected property

rights. Those cases explicitly preclude a finding of unconstitutionality in the mere refusal of a property owner to sell, even if his refusal is based upon voluntary adherence to a racially restrictive covenant. Such a finding would deprive property owners of their rights to sell when and to whom they choose and would create in members of particular groups a new and exclusive preemptive right.

Although the individual appellants have the same constitutional right as their fellow citizens to inherit property by will and intestate succession, neither the Fourteenth Amendment nor any other provision of the Federal Constitution gives them or any other citizen the right, *qua* citizen, to inherit any particular property or from any particular estate. They must first be specifically named or come within a class specified by the testator, or be entitled to take against the will or, if there is no will, by intestacy. The administration of a testator's estate by state courts pursuant to a valid will creates no rights in any member of the general public. As this Court said many years ago, "The fourteenth amendment * * * *does not* * * * *add anything to the rights which one citizen has under the Constitution against another.*" *United States* v. *Cruikshank*, 92 U. S. 542, 554 (1875).[12] (Emphasis supplied.)

(b) The Removal of the City as Trustee Conferred on Individual Appellants No Rights in the Estate of Stephen Girard.

In the last analysis, appellants' contention that the removal of the City as trustee violates the Fourteenth Amendment must rest on one of two interrelated propositions, both of which are untenable. The first of these is that members of particular groups can create new rights

[12] The *Cruikshank* case has been frequently quoted and followed on this point: *e. g.*, *United States* v. *Harris*, 106 U. S. 629, 638 (1882); *James* v. *Bowman*, 190 U. S. 127, 136 (1903); *Collins* v. *Hardyman*, 341 U. S. 651, 658 (1951).

for themselves simply by alleging such rights in a State court and having them denied. The second is that the individual appellants have a vested right to have the City participate in the operation of Girard College, even though the City cannot constitutionally carry out the terms of the Will. These two propositions will be considered in that order.

Appellants' argument based on *Shelley, Barrows,* and *Railway Employes' Dept. A.F.L.* v. *Hanson,* 351 U. S. 225 (1956), is nothing more than a claim that because the individual appellants have been denied admission to Girard College by the state courts, the Fourteenth Amendment entitles them to admission.

The individual appellants are claiming that their minority group status transforms a state court adjudication that they have no rights in certain private property into an adjudication whereby the STATE discriminatorily deprives them of property rights. If this be so, a state court cannot uphold a testamentary trust for the benefit of Negroes without depriving members of the white, yellow, and red races of equal protection of the laws. Clearly, a claimant who has no rights as a beneficiary or as a member of a beneficiary class has no standing to challenge on constitutional grounds the probate of a valid will, the appointment of an administrator or trustee, the denial of a claim, or the removal of a fiduciary who wrongfully recognizes a claim or cannot carry out the provisions of the will.[13]

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[13] Appellants seek to clinch their contention with the supposititious argument that if the Board of City Trusts first admitted the individual appellants and the Orphans' Court then removed the City as trustee and expelled them, there would be a clear violation of the Fourteenth Amendment. This assumes, contrary to the facts of this case, that a trustee will commit a breach of trust. It further assumes that a breach of trust can create in those who participate therein, and who are not beneficiaries, rights which a state court must protect.

From the decisions involving "Jaybird" primaries[14] and evasive leases of public property,[15] appellants seek to conclude that the City cannot constitutionally be removed as trustee and therefore individual appellants are entitled to admission to Girard College. The thrust of their argument seems to be that there is some constitutional requirement that the City remain as trustee of this private institution and that the Pennsylvania courts have forced the City to abdicate or evade this requirement. The teaching of the "Jaybird" primary cases is that the State cannot abdicate a necessary State function by permitting or endeavoring to make it wholly private. The right to participate in the electoral process on equal terms is obviously so much a part of the birthright of free men that it cannot be taken away from any group even by the failure of the State to act.

The second line of cases holds ineffective colorable leases of publicly-owned recreational facilities designed either to exclude Negroes entirely from, or to continue segregated use of, public facilities. In those cases the State was, and for all practical purposes remained, the owner and operator of the facilities and was required, therefore, to make them available on equal terms to all its citizens. Such decisions would be relevant only if Philadelphia were attempting, for discriminatory purposes, to abolish, or to lease to private persons, its established public school system. In this day and age, public schools may well have become so much a part of

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[14] *Terry* v. *Adams*, 345 U. S. 461 (1953); *Smith* v. *Allwright*, 321 U. S. 649 (1944); *Rice* v. *Elmore*, 165 F. 2d 387 (4 Cir. 1947), *cert. den.*, 333 U. S. 875 (1948).

[15] *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955); *Mayor of Baltimore* v. *Dawson*, 350 U. S. 877 (1955); *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U. S. 971 (1954), *vacating* 202 F. 2d 275 (6 Cir. 1953); *City of Greensboro* v. *Simkins*, 246 F. 2d 425 (4 Cir. 1957); *Tate* v. *Department of Conservation and Development*, 133 F. Supp. 53 (E. D. Va. 1955), *aff'd per curiam*, 231 F. 2d 615 (4 Cir. 1956); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S. D. W. Va. 1948).

the American scene that children are entitled to have the State make available to them an unsegregated educational system. See *Brown* v. *Board of Education, supra,* 347 U. S. at 493.

The removal of the City as trustee of the Girard College trust can have no effect whatever on the Philadelphia public school system. Since *Trustees of Dartmouth College* v. *Woodward.* 4 Wheat. 518 (1819), it has been recognized that private schools such as Girard College not only exist, but are in fact entitled to exist, apart from the public school system. *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925). When the Orphans' Court removed the City as trustee of the Girard College trust, both Girard College and the City's public school system were left standing, as they have always stood, as independent entities with clearly independent sources of funds for their respective operations. No citizen of Philadelphia was thereby deprived of any public property, because not one cent of the taxpayers' money has gone into Girard College. The College was established solely with Stephen Girard's money pursuant to, and is administered in accordance with, the meticulous directions of Section XXI of his Will. It has been maintained solely by the income from his Estate pursuant to Sections XXI and XXIV of the Will. No Philadelphia child is denied a public school education or is compelled to attend a segregated school.

CONCLUSION.

Appellants charge that the action of the Pennsylvania courts provides a blueprint for the evasion of the decrees of this Court, with obvious reference to legislation passed by certain states following the decision in *Brown* v. *Board of Education,* 347 U. S. 483 (1954). The distinction between such legislation and the present case is too evident to warrant discussion.

The courts of Pennsylvania have not evaded. They have acted in accordance with the purpose for which they were formed and in accordance with the established law of Pennsylvania, as well as the law of charitable trusts laid down in opinions of this Court beginning in 1844.

It is agreed that this Court has always been solicitous of individual rights. So also have the Orphans' Court of Philadelphia County and the Supreme Court of Pennsylvania been solicitous of individual rights in taking the action of which the appellants here complain. Those courts have protected the right of an individual to dispose of his property by will as he sees fit. They have protected the rights of the members of the beneficiary class named by the testator to receive undiminished the benefits which he intended for them. It so happens that, in this case, the beneficiaries are "poor white male orphans." But in protecting them, the Pennsylvania Courts, applying the long-established law of the Commonwealth, have at the same time protected the rights of all beneficiaries of every private charity created by will, no matter what the race, creed or color of such beneficiaries may be.

That is the blueprint which the Pennsylvania Courts have followed and have in this case provided, a blueprint for the protection of individual rights.

Wherefore, it is respectfully requested that this Court grant the motion to dismiss the appeal and deny the petition for writ of certiorari.

Respectfully submitted,

ARTHUR LITTLETON,
Attorney for Substituted
Trustees, Appellees.

MORGAN, LEWIS & BOCKIUS,
Of Counsel.

APPENDIX A.

WILL OF STEPHEN GIRARD

Dated February 16, 1830. Codicils dated December 25, 1830, June 20, 1831.

Proved December 31, 1831.

Recorded Philada. Will Book 10, p. 198.

I, Stephen Girard, of the City of Philadelphia, in the Commonwealth of Pennsylvania, mariner and merchant, being of sound mind, memory, and understanding, do make and publish this my last will and testament, in manner following, that is to say . . .

I. I give and bequeath unto "The Contributors to the Pennsylvania Hospital," of which corporation I am a member, the sum of thirty thousand dollars, upon the following conditions, namely, that the said sum shall be added to their capital, and shall remain a part thereof forever, to be placed at interest and the interest thereof to be applied, in the first place to pay to my black woman Hannah (to whom I hereby give her freedom) the sum of two hundred dollars per year, in quarterly payments of fifty dollars each in advance, during all the term of her life; and, in the second place, the said interest to be applied to the use and accommodation of the sick in the said hospital, and for providing and at all times having competent matrons, and a sufficient number of nurses and assistant nurses, in order not only to promote the purposes of the said hospital, but to encrease this class of useful persons much wanted in our city:

II. I give and bequeath to "The Pennsylvania Institution for the Deaf and Dumb" the sum of twenty thousand dollars, for the use of that institution:

III. I give and bequeath to "The Orphan Asylum of Philadelphia," the sum of ten thousand dollars for the use of that Institution:

IV. I give and bequeath to "the Comptrollers of the public schools for the city and county of Philadelphia" the sum of ten thousand dollars for use of the schools upon the Lancaster system, in the first section of the first school district of Pennsylvania.

V. I give and bequeath to "The Mayor, Aldermen and Citizens of Philadelphia," the sum of ten thousand dollars, in trust safely to invest the same in some productive fund, and with the interest and dividends arising therefrom to purchase fuel between the months of March and August in every year forever, and in the month of January in every year forever distribute the same, amongst poor white housekeepers and roomkeepers, of good character, residing in the city of Philadelphia.

VI. I give and bequeath to the society for the relief of poor and distressed masters of ships, their widows and children, (of which society I am a member) the sum of ten thousand dollars to be added to their capital stock, for the uses and purposes of said society.

VII. I give and bequeath to the gentlemen, who shall be trustees of the Masonic Loan at the time of my decease, the sum of twenty thousand dollars, including therein ten thousand and nine hundred dollars due to me, part of the Masonic Loan, and any interest that may be due thereon at the time of my decease, in trust for the use and benefit of "the Grand Lodge of Pennsylvania and masonic jurisdiction thereto belonging," and to be paid over by the said trustees to the said Grand Lodge for the purposes of being invested in some safe stock or funds,

or other good security, and the dividends and interest arising therefrom to be again so invested and added to the capital, without applying any part thereof to any other purpose until the whole capital shall amount to thirty thousand dollars, when the same shall forever after remain a permanent fund or capital, of the said amount of thirty thousand dollars, the interest whereof shall be applied from time to time to the relief of poor and respectable brethren: and in order that the real and benevolent purposes of masonic institutions may be attained, I recommend to the several lodges not to admit to membership, or to receive members from other lodges, unless the applicants shall absolutely be men of sound and good morals.

VIII. I give and bequeath unto Philip Peltz, John Lentz, Francis Hesley, Jacob Baker and Adam Young, of Passyunk township, in the county of Philadelphia, the sum of six thousand dollars, in trust that they or the survivors or survivor of them shall purchase a suitable piece of ground, as near as may be in the centre of said township, and thereon erect a substantial brick building, sufficiently large for a school house and the residence of a schoolmaster, one part thereof for poor male white children, and the other part for poor female white children of said township; and as soon as the said school-house shall have been built, that they the said trustees or the survivors or survivor of them shall convey the said piece of ground and house thereon erected, and shall pay over such balance of said sum as may remain unexpended, to any board of directors and their successors in trust, which may at the time exist or be by law constituted, consisting of at least twelve discreet inhabitants of the said township, and to be annually chosen by the inhabitants thereof; the said piece of ground and house to be carefully maintained by said directors and their successors solely for the purposes of a school as aforesaid

forever, and the said balance to be securely invested as a permanent fund, the interest thereof to be applied from time to time towards the education in the said school of any number of such poor white children of said township; and I do hereby recommend to the citizens of the said township to make additions to the fund whereof I have laid the foundation.

IX. I give and devise my house and lot of ground thereto belonging, situate in rue Ramouet aux Chartrons, near the city of Bordeaux, in France, and the rents issues and profits thereof to my brother Etienne Girard and my niece Victoire Fenellon (daughter of my late sister Sophia Girard Capayron) (both residing in France) in equal moieties for the life of my said brother, and, on his decease, one moiety of the said house and lot to my said niece Victoire and her heirs forever, and the other moiety to the six children of my said brother, namely John Fabricius, Marguerite, Anne Henriette, Jean August, Marie, and Madelaine Henriette, share and share alike (the issue of any deceased child if more than one to take amongst them the parent's share) and their heirs forever.

X. I give and bequeath to my said brother Etienne Girard the sum of five thousand dollars, and the like sum of five thousand dollars to each of his six children above named: if any of the said children shall die prior to the receipt of his or her legacy of five thousand dollars, the said sum shall be paid, and I give and bequeath the same, to any issue of such deceased child, if more than one share and share alike.

XI. I give and bequeath to my said niece Victoire Fenellon the sum of five thousand dollars.

XII. I give and bequeath absolutely to my niece Antoinetta, now married to Mr. Hemphill, the sum of ten thousand dollars, and I also give and bequeath to her the

sum of fifty thousand dollars, to be paid over to a trustee or trustees to be appointed by my executors, which trustee or trustees shall place and continue the said sum of fifty thousand dollars upon good security, and pay the interest and dividends thereof as they shall from time to time accrue, to my said niece for her separate use, during the term of her life, and from and immediately after her decease, to pay and distribute the capital to and among such of her children and the issue of deceased children, and in such parts and shares as she the said Antoinetta, by any instrument under her hand and seal executed in the presence of at least two credible witnesses shall direct and appoint, and for default of such appointment then to and among the said children and issue of deceased children in equal shares, such issue of deceased children if more than one to take only the share which their deceased parent would have taken if living.

XIII. I give and bequeath unto my niece Carolina, now married to Mr. Haslam, the sum of ten thousand dollars, to be paid over to a trustee or trustees to be appointed by my executors, which trustee or trustees shall place and continue the said money upon good security, and pay the interest and dividends thereof from time to time, as they shall accrue, to my said niece, for her separate use, during the term of her life; and, from and immediately after her decease, to pay and distribute the capital to and among such of her children and issue of deceased children, and in such parts and shares, as she the said Carolina, by any instrument under her hand and seal executed, in the presence of at least two credible witnesses, shall direct and appoint, and for default of such appointment, then to and among the said children and issue of deceased children, in equal shares, such issue of deceased children if more than one, to take only the share which the deceased parent would have taken if living: but if my said niece Carolina shall leave no issue,

the said trustee or trustees on her decease shall pay the said capital and any interest accrued thereon to and among Caroline Lallemand (niece of the said Caroline) and the children of the aforesaid Antoinetta Hemphill, share and share alike.

XIV. I give and bequeath to my niece Henrietta, now married to Dr. Clark, the sum of ten thousand dollars; and I give and bequeath to her daughter Caroline (in the last clause above named) the sum of twenty thousand dollars—the interest of the said sum of twenty thousand dollars, or so much thereof as may be necessary, to be applied to the maintenance and education of the said Caroline during her minority, and the principal with any accumulated interest to be paid to the said Caroline, on her arrival at the age of twenty-one years.

XV. Unto each of the captains, who shall be in my employment at the time of my decease, either in port or at sea, having charge of one of my ships or vessels, and having performed at least two voyages in my service, I give and bequeath the sum of fifteen hundred dollars—provided he shall have brought safely into the port of Philadelphia, or if at sea at the time of my decease shall bring safely into that port, my ship or vessel last entrusted to him, and also that his conduct during the last voyage shall have been in every respect conformable to my instructions to him.

XVI. All persons, who at the time of my decease, shall be bound to me by indenture, as apprentices or servants, and who shall then be under age, I direct my executors to assign to suitable masters immediately after my decease, for the remainder of their respective terms, on conditions as favorable as they can in regard to education, clothing, and freedom dues; to each of the said persons, in my service and under age at the time of my decease I give and bequeath the sum of five hundred dollars, which sums

respectively I direct my executors safely to invest in public stock, to apply the interest and dividends thereof towards the education of the several apprentices or servants, for whom the capital is given, respectively, and at the termination of the apprenticeship or service of each to pay to him or her the said sum of five hundred dollars and any interest accrued thereon, if any such interest shall remain unexpended: in assigning any indenture, preference shall be given to the mother, father, or next relation, as assignee, should such mother, father, or relative desire it, and be at the same time respectable and competent.

XVII. I give and bequeath to Francis Hesley (son of Mrs. S. Hesley, who is mother of Marianne Hesley) the sum of one thousand dollars, over and above such sum as may be due to him at my decease.

XVIII. I charge my real estate in the state of Pennsylvania with the payment of the several annuities or sums following. (the said annuities to be paid by the treasurer or other proper officer of the city of Philadelphia appointed by the corporation thereof for the purpose out of the rents and profits of said real estate, hereinafter directed to be kept constantly rented) namely:

1. I give and bequeath to Mrs. Elizabeth Ingersoll, widow of Jared Ingersoll, esq., late of the city of Philadelphia, counsellor at law, an annuity or yearly sum of one thousand dollars, to be paid in half yearly payments, in advance, of five hundred dollars each during her life:—

2. I give and bequeath to Mrs. Catherine Girard, now widow of Mr. J. B. Hoskins, who died in the isle of France, an annuity or yearly sum of four hundred dollars, to be paid in half yearly payments in advance of two hundred dollars each, during her life.

3. I give and bequeath to Mrs. Jane Taylor, my present housekeeper (the widow of the late captain Alex-

ander Taylor, who was master of my ship Helvetius and died in my employment) an annuity or yearly sum of five hundred dollars, to be paid in half yearly payments in advance of two hundred and fifty dollars each, during her life.

4. I give and bequeath Mrs. S. Hesley, my house-keeper at my place in Passyunk Township, an annuity or yearly sum of five hundred dollars, to be paid in half yearly payments in advance of two hundred and fifty dollars each during her life.

5. I give and bequeath to Marianne Hesley, daughter of Mrs. S. Hesley, an annuity or yearly sum of three hundred dollars, to be paid to her mother for her use in half yearly payments in advance of one hundred and fifty dollars each, until the said Marianne shall have attained the age of twenty-one years, when the said annuity shall cease, and the said Marianne will receive the five hundred dollars given to her and other indented persons, according to clause XVI. of this will:

6. I give and bequeath to my late house-keeper, Mary Kenton, an annuity or yearly sum of three hundred dollars to be paid in half year payments in advance of one hundred and fifty dollars each during her life.

7. I give and bequeath to Mrs. Deborah Scott, sister of Mary Kenton, and wife of Mr. Edwin T. Scott, an annuity or yearly sum of three hundred dollars, to be paid in half yearly payments in advance of one hundred and fifty dollars each, during her life.

8. I give and bequeath to Mrs. Catherine McLaren, sister of Mary Kenton, and wife of Mr. M. McLaren, an annuity or yearly sum of three hundred dollars, to be paid in half yearly payments in advance of one hundred and fifty dollars each, during her life.

9. I give and bequeath to Mrs. Amelia G. Taylor, wife of Mr. Richd M. Taylor, an annuity or yearly sum of three

hundred dollars to be paid in half yearly payments in advance of one hundred and fifty dollars each during her life.

XIX. All that part of my real and personal estate, near Washita, in the state of Louisiana, the said real estate consisting of upwards of two hundred and eight thousand arpens or acres of land, and including therein the settlement hereinafter mentioned, I give, devise, and bequeath, as follows, namely: 1. I give devise and bequeath to the corporation of the City of New Orleans, their successors and assigns, all that part of my real estate, constituting the settlement formed on my behalf by my particular friend Judge Henry Bree, of Washita, consisting of upwards of one thousand arpens or acres land with the appurtenances and improvements thereon, and also all the personal estate thereto belonging and thereon remaining, including upwards of thirty slaves now on said settlement and their encrease, in trust, however, and subject to the following reservations: I desire, that no part of the said estate or property, or the slaves thereon, or their encrease, shall be disposed of or sold for the term of twenty years from and after my decease, should the said judge Henry Bree survive me and live so long, but that the said settlement shall be kept up by the said judge Henry Bree, for and during said term of twenty years, as if it was his own, that is, it shall remain under his sole care and control, he shall improve the same by raising such produce as he may deem most advisable, and, after paying taxes and all expenses in keeping up the settlement by clothing the slaves and otherwise, he shall have and enjoy for his own use all the nett profits of said settlement —provided however and I desire that the said judge Henry Bree shall render annually to the corporation of the City of New Orleans, a report of the state of the settlement, the income and expenditure thereof, the number and encrease of the slaves, and the nett result of the whole. I desire that, at the expiration of the said term of twenty

years, or on the decease of the said Judge Henry Bree, should he not live so long, the land and improvement forming said settlement, the slaves thereon or thereto belonging, and all other appurtenant personal property, shall be sold, as soon as the said Corporation shall deem it advisable to do so, and the proceeds of the said sale or sales shall be applied by the said corporation to such uses and purposes as they sh ll consider most likely to promote the health and general prosperity of the inhabitants of the City of New Orleans: But, until the said sale shall be made, the said corporation shall pay all taxes, prevent waste or intrusion, and so manage the said settlement and the slaves and their encrease thereon, as to derive an income, and the said income shall be applied from time to time, to the same uses and purposes for the health and general prosperity of the said inhabitants. 2. I give devise and bequeath to the Mayor Aldermen and citizens of Philadelphia, their successors and assigns, two undivided third parts of all the rest and residue of my said real estate, being the lands unimproved near Washita in the said state of Louisiana, in trust, that, in common with the corporation of the city of New Orleans, they shall pay the taxes on the said lands, and preserve them from waste or intrusion, for the term of ten years from and after my decease, and, at the end of the said term, when they shall deem it advisable to do so, shall sell and dispose of their interest in said lands gradually from time to time, and apply the proceeds of such sales to the same uses and purposes hereinafter declared and directed of and concerning the residue of my personal estate. 3. And I give devise and bequeath to the Corporation of the city of New Orleans, their successors and assigns, the remaining one undivided third part of the said lands, in trust, in common with the Mayor Aldermen and citizens of Philadelphia, to pay the taxes on the said lands and preserve them from waste and intrusion for the term of ten years from and after my decease, and, at the end of the said term when they shall

deem it advisable to do so, to sell and dispose of their interest in said lands gradually from time to time, and to apply the proceeds of such sales to such uses and purposes as the said corporation may consider most likely to promote the health and general prosperity of the inhabitants of the City of New Orleans.

XX. And whereas I have been for a long time impressed with the importance of educating the poor, and of placing them by the early cultivation of their minds and the development of their moral principles, above the many temptations, to which, through poverty and ignorance they are exposed; and I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds: And whereas, together with the object just adverted to, I have sincerely at heart the welfare of the city of Philadelphia, and, as a part of it, am desirous to improve the neighborhood of the river Delaware, so that the health of the citizens may be promoted and preserved, and that the eastern part of the city may be made to correspond better with the interior: Now, I do give devise and bequeath all the residue and remainder of my real and personal estate of every sort and kind wheresoever situate (the real estate in Pennsylvania charged as aforesaid) unto "The Mayor, Aldermen and citizens of Philadelphia" their successors and assigns in trust to and for the several uses intents and purposes hereinafter mentioned and declared of and concerning the same, that is to say: So far as regards my real estate in Pennsylvania, in trust, that no part thereof shall ever be sold or alienated by the said The Mayor Aldermen and citizens of Philadelphia or their successors, but the same shall forever thereafter be let from time to time to good tenants, at yearly or other rents and upon leases in possession not exceeding five years from the commencement

thereof, and that the rents issues and profits arising therefrom shall be applied towards keeping that part of the said real estate situate in the city and Liberties of Philadelphia constantly in good repair (parts elsewhere situate to be kept in repair by the tenants thereof respectively) and towards improving the same whenever necessary by erecting new buildings, and that the net residue (after paying the several annuities herein before provided for) be applied to the same uses and purposes as are herein declared of and concerning the residue of my personal estate; And so far as regards my real estate in Kentucky, now under the care of Messrs. Triplett and Burmley, in trust to sell and dispose of the same, whenever it may be expedient to do so, and to apply the proceeds of such sale to the same uses and purposes as are herein declared of and concerning the residue of my personal estate.

XXI. And so far as regards the residue of my personal estate, in trust, as to two millions of dollars, part thereof, to apply and expend so much of that sum as may be necessary—in erecting as soon as practicably may be, in the centre of my square of ground between High and Chestnut streets and Eleventh and Twelfth streets, in the city of Philadelphia (which square of ground I hereby devote for the purposes hereinafter stated, and for no other, forever) a permanent College, with suitable out-buildings, sufficiently spacious for the residence and accommodation of at least three hundred scholars, and the requisite teachers and other persons necessary in such an institution as I direct to be established; and in supplying the said college and out-buildings with decent and suitable furniture, as well as books and all other things needful to carry into effect my general design. The said College shall be constructed with the most durable materials and in the most permanent manner, avoiding needless ornament, and attending chiefly to the strength.

convenience and neatness of the whole: It shall be at least one hundred and ten feet east and west, and one hundred and sixty feet north and south, and shall be built on lines parallel with High and Chestnut streets and Eleventh and Twelfth streets, provided those lines shall constitute at their junction right angles: It shall be three stories in height, each story at least fifteen feet high in the clear from the floor to the cornice: It shall be fire-proof inside and outside, the floors and the roof to be formed of solid materials, on arches turned on proper centres, so that no wood may be used, except for doors, windows and shutters: Cellars shall be made under the whole building, solely for the purposes of the institution; the doors to them from the outside shall be on the east and west of the building, and access to them from the inside shall be had by steps, descending to the cellar floor from each of the entries or halls hereinafter mentioned, and the inside cellar doors to open under the stairs on the north-east and north-west corners of the northern entry, and under the stairs on the south-east and south-west corners of the southern entry; there should be a cellar window under and in a line with, each window in the first story—they should be built one half below, the other half above, the surface of the ground, and the ground outside each window should be supported by stout walls; the sashes should open inside, on hinges, like doors, and there should be strong iron bars outside each window; the windows inside and outside should not be less than four feet wide in the clear: There shall be in each story, four rooms, each room not less than fifty feet square in the clear; the four rooms on each floor to occupy the whole space east and west on such floor or story, and the middle of the building north and south; so that in the north of the building, and in the south thereof, there may remain a space, of equal dimensions, for an entry or hall in each, for stairs and landings: In the north-east and in the north-west corners of the northern entry or

hall on the first floor, stairs shall be made so as to form a double staircase, which shall be carried up through the several stories; and, in like manner, in the south-east and south-west corners of the southern entry or hall, stairs shall be made, on the first floor, so as to form a double stair-case, to be carried up through the several stories; the steps of the stairs to be made of smooth white marble with plain square edges, each step not to exceed nine inches in the rise, nor to be less than ten inches in the tread: the outside and inside foundation walls shall be at least ten feet high in the clear from the ground to the ceiling: the first floor shall be at least three feet above the level of the ground around the building, after that ground shall have been so regulated as that there shall be a gradual descent from the centre to the sides of the square formed by High and Chestnut, and Eleventh and Twelfth streets: all the outside foundation walls, forming the cellars, shall be three feet and six inches thick up to the first floor, or as high as may be necessary to fix the centres for the first floor; and the inside foundation wall, running north and south, and the three inside foundation walls, running east and west, (intended to receive the interior walls for the four rooms each not less than fifty feet square in the clear, above mentioned) shall be three feet thick up to the first floor, or as high as may be necessary to fix the centres for the first floor: when carried so far up, the outside walls shall be reduced to two feet in thickness, leaving a recess outside of one foot and inside six inches—and when carried so far up, the inside foundation walls shall also be reduced, six inches on each side, to the thickness of two feet; centres shall then be fixed on the various recesses of six inches throughout, left for the purpose, the proper arches shall be turned, and the first floor laid: the outside and the inside walls shall then be carried up of the thickness of two feet throughout, as high as may be necessary to begin the recess intended to fix the centres for the second

floor, that is the floor for the four rooms each not less than fifty feet square in the clear, and for the landing in the north, and the landing in the south, of the building, where the stairs are to go up—at this stage of the work, a chain, composed of bars of inch square iron, each bar about ten feet long, and linked together by hooks formed of the ends of the bars, shall be laid straitly and horizontally along the several walls, and shall be as tightly as possible worked into the centre of them throughout, and shall be secured wherever necessary, especially at all the angles, by iron clamps solidly fastened, so as to prevent cracking or swerving in any part: centres shall then be laid, the proper arches turned for the second floor and landings, and the second floor and landings shall be laid: the outside and the inside walls shall then be carried up of the same thickness of two feet throughout as high as may be necessary to begin the recess intended to fix the centres for the third floor and landings; and, when so far carried up, another chain similar in all respects to that used at the second story, shall be in like manner worked into the walls throughout as tightly as possible, and clamped in the same way with equal care; centres shall be formed, the proper arches turned, and the third floor landings shall be laid: the outside and the inside walls shall then be carried up, of the same thickness of two feet throughout, as high as may be necessary to begin the recess intended to fix the centres for the roof; and, when so carried up, a third chain, in all respects like those used at the second and third stories, shall in the manner before described be worked as tightly as possible into the walls throughout, and shall be clamped with equal care; centres shall now be fixed in the manner best adapted for the roof, which is to form the ceiling for the third story, the proper arches shall be turned, and the roof shall be laid as nearly horizontally as may be, consistently with the easy passage of water to the eaves: the outside walls, still

of the thickness of two feet throughout, shall then be carried up about two feet above the level of the platform, and shall have marble capping, with a strong and neat iron railing thereon: The outside walls shall be faced with slabs or blocks of marble or granite, not less than two feet thick, and fastened together with clamps securely sunk therein—they shall be carried up flush from the recess of one foot formed at the first floor where the foundation outside wall is reduced to two feet: The floors and landings as well as the roof shall be covered with marble slabs, securely laid in mortar; the slabs on the roof to be twice as thick as those on the floor. In constructing the walls, as well as in turning the arches, and laying the floors, landings, and roof, good and strong mortar, and grout, shall be used, so that no cavity whatever may any where remain. A furnace or furnaces for the generation of heated air shall be placed in the cellar, and the heated air shall be introduced in adequate quantity wherever wanted by means of pipes and flues inserted and made for the purpose in the walls, and as those walls shall be constructed. In case it shall be found expedient, for the purposes of a library or otherwise, to encrease the number of rooms by dividing any of those directed to be not less than fifty feet square in the clear, into parts, the partition walls to be of solid materials. A room most suitable for the purpose, shall be set apart for the reception and preservation of my books and papers, and I direct that they shall be placed there by my executors and carefully preserved therein. There shall be two principal doors of entrance into the college, one into the entry or hall on the first floor in the north of the building, and in the centre between the east and west walls, the other into the entry or hall in the south of the building, and in the centre between the east and west walls; the dimensions to be determined by a due regard to the size of the entire building, to that of the entry, and to the purposes of the doors. The necessity for, as well as the

position and size of other doors, internal or external, and also the position and size of the windows, to be, in like manner, decided on by a consideration of the uses to which the building is to be applied, the size of the building itself and of the several rooms, and of the advantages of light and air: there should in each instance be double doors, those opening into the rooms to be what are termed glass doors, so as to encrease the quantity of light for each room, and those opening outward to be of substantial wood work well lined and secured: the windows of the second and third stories I recommend to be made in the style of those in the first and second stories of my present dwelling house North Water street, on the eastern front thereof; and outside each window I recommend that a substantial and neat iron balcony be placed sufficiently wide to admit the opening of the shutters against the walls; the windows of the lower story to be in the same style, except that they are not to descend to the floor, but so far as the surbase, up to which the wall is to be carried, as is the case in the lower story of my house at my place in Passyunk township. In minute particulars, not here noticed, utility and good taste should determine. There should be at least four out-buildings, detached from the main edifice and from each other, and in such positions as shall at once answer the purposes of the institution, and be consistent with the symmetry of the whole establishment:—each building should be, as far as practicable, devoted to a distinct purpose: in that one or more of those buildings, in which they may be most useful, I direct my executors to place my plate and furniture of every sort. The entire square, formed by High and Chestnut streets, and Eleventh and Twelfth streets, shall be enclosed with a solid wall, at least fourteen inches thick and ten feet high, capped with marble and guarded with irons on the top so as to prevent persons from getting over: there shall be two places of entrance into the square, one in the centre of the wall facing High street,

and the other in the centre of the wall facing Chestnut street: at each place of entrance there shall be two gates, one opening inward and the other outward; those opening inward to be of iron and in the style of the gates north and south of my banking house, and those opening outward to be of substantial wood work well lined and secured on the faces thereof with sheet iron. The messuages now erected on the south-east corner of High and Twelfth streets, and on Twelfth street, to be taken down and removed, as soon as the College and out-buildings shall have been erected, so that the establishment may be rendered secure and private.

When the college and appurtenances shall have been constructed, and supplied with plain and suitable furniture, and books, philosophical and experimental instruments and apparatus, and all other matters needful to carry my general design into execution; the income issues and profits of so much of the said sum of two millions of dollars as shall remain unexpended shall be applied to maintain the said college according to my directions:

1. The institution shall be organized as soon as practicable, and, to accomplish that purpose more effectually, due public notice of the intended opening of the college shall be given—so that there may be an opportunity to make selections of competent instructors, and other agents, and those who may have the charge of orphans may be aware of the provision intended for them:

2. A competent number of instructors, teachers, assistants and other necessary agents, shall be selected and when needful their places from time to time supplied: they shall receive adequate compensation for their services: but no person shall be employed, who shall not be of tried skill in his or her proper department, of established moral character—and in all cases persons shall be chosen on account of their merit, and not through favor or intrigue.

3. As many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain, shall be introduced into the college as soon as possible; and from time to time as there may be vacancies, or as increased ability from income may warrant, others shall be introduced.

4. On the application for admission, an accurate statement should be taken, in a book prepared for the purpose, of the name, birthplace, age, health, condition as to relatives, and other particulars, useful to be known, of each orphan.

5. No orphan should be admitted until the guardians or directors of the poor, or a proper guardian, or other competent authority, shall have given, by indenture, relinquishment, or otherwise, adequate power to the Mayor, Aldermen and citizens of Philadelphia, or to directors or others by them appointed, to enforce, in relation to each orphan, every proper restraint, and to prevent relatives or others from interfering with or withdrawing such orphan from the institution.

6. Those orphans, for whose admission application shall first be made, shall be first introduced, all other things concurring—and at all future times priority of application shall entitle the applicant to preference in admission, all other things concurring: but, if there shall be at any time more applicants than vacancies, and the applying orphans shall have been born in different places, a preference shall be given,—first to orphans born in the city of Philadelphia; secondly, to those born in any other part of Pennsylvania; thirdly to those born in the city of New York (that being the first port on the continent of North America, at which I arrived); and lastly, to those born in the city of New Orleans, being the first port on the said continent at which I first traded, in the first instance as first officer, and subsequently as master and part owner of a vessel and cargo.

7. The orphans, admitted into the College, shall be there fed with plain but wholesome food, clothed with plain but decent apparel (no distinctive dress ever to be worn) and lodged in a plain but safe manner: Due regard shall be paid to their health, and to this end their persons and clothes shall be kept clean, and they shall have suitable and rational exercise and recreation: They shall be instructed in the various branches of a sound education, comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical, and experimental philosophy, the French and Spanish languages (I do not forbid, but I do not recommend, the Greek and Latin Languages)—and such other learning and science, as the capacities of the several scholars may merit or warrant: I would have them taught facts and things, rather than words or signs: And, especially, I desire, that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience, as guaranteed by our happy constitutions, shall be formed and fostered in the minds of the scholars.

8. Should it unfortunately happen, that any of the orphans, admitted into the college, shall, from malconduct, have become unfit companions for the rest, and mild means of reformation prove abortive, they should no longer remain therein.

9. Those scholars, who shall merit it, shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age; they shall then be bound out by the Mayor Aldermen and citizens of Philadelphia, or under their direction, to suitable occupations, as those of agriculture, navigation, arts, mechanical trades, and manufactures, according to the capacities and acquirements of the scholars respectively; consulting, as far as prudence shall justify it, the inclinations of the several scholars, as to the occupation, art, or trade, to be learned.

In relation to the organization of the college and its appendages, I leave, necessarily, many details to the Mayor Aldermen and citizens of Philadelphia and their successors; and I do so, with the more confidence, as, from the nature of my bequests and the benefit to result from them, I trust that my fellow citizens of Philadelphia, will observe and evince especial care and anxiety in selecting members for their City Councils, and other agents: There are, however, some restriction, which I consider it my duty to prescribe, and to be, amongst others, conditions on which my bequest for said college is made and to be enjoyed, namely: first I enjoin and require, that, if, at the close of any year, the income of the fund devoted to the purposes of the said college shall be more than sufficient for the maintenance of the institution during that year, then the balance of the said income, after defraying such maintenance, shall be forthwith invested in good securities, thereafter to be and remain a part of the capital; but, in no event, shall any part of the said capital be sold, disposed of, or pledged, to meet the current expenses of the said institution, to which I devote the interest, income, and dividends thereof exclusively: secondly, I enjoin and require, that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college:— . . . In making this restriction, I do not mean to cast any reflection upon any sect or person whatsover; but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitements, which clashing doctrines and sectarian controversy are so apt to produce; My desire is, that all the instructors and teachers in the college shall take pains to instil into the minds of the

scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow creatures, and a love of truth, sobriety and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.

. . . If the income, arising from that part of the said sum of two millions of dollars, remaining after the construction and furnishing of the college and out-buildings, shall, owing to the encrease of the number of orphans, applying for admission, or other cause, be inadequate to the construction of new buildings, or the maintenance and education of as many orphans as may apply for admission, then such further sum as may be necessary for the construction of new buildings and the maintenance and education of such further number of orphans, as can be maintained and instructed within such buildings as the said square of ground shall be adequate to, shall be taken from the final residuary fund hereinafter expressly referred to for the purpose, comprehending the income of my real estate in the city and county of Philadelphia, and the dividends of my stock in the Schuylkill navigation company—my design and desire being, that the benefits of said institution shall be extended to as great a number of orphans as the limits of the said square and buildings therein can accommodate.

XXII. And as to the further sum of five hundred thousand dollars, part of the residue of my personal estate, in trust, to invest the same securely, and to keep the same so invested, and to apply the income thereof exclusively to the following purposes, that is to say:

1. To lay out, regulate, curb, light and pave a passage or street, on the east part of the city of Philadelphia, fronting the river Delaware, not less than twenty-one feet wide, and to be called Delaware Avenue, extending from

South or Cedar street, all along the east part of Water street squares, and the west side of the logs, which form the heads of the docks, or thereabouts; and to this intent to obtain such acts of Assembly, and to make purchases or agreements, as will enable the Mayor Aldermen and citizens of Philadelphia to remove or pull down all the buildings, fences and obstructions, which may be in the way, and to prohibit all buildings, fences, or erections of any kind to the eastward of said avenue;—to fill up the heads of such of the docks as may not afford sufficient room for the said street;—to compel the owners of wharves to keep them clean and covered completely with gravel or other hard materials, and to be so levelled that water will not remain thereon after a shower of rain,—to completely clean and keep clean all the docks within the limits of the city, fronting on the Delaware;—and to pull down all platforms carried out, from the east part of the city over the river Delaware, on piles or pillars.

2. To pull down and remove all wooden buildings, (as well those made of wood and other combustible materials as those called brick-paned or frame buildings filled in with bricks) that are erected within the limits of the City of Philadelphia—and also to prohibit the erection of any such buildings within the said city's limits at any future time.

3. To regulate, widen, pave, and curb Water street, and to distribute the Schuylkill water therein upon the following plan that is to say, . . . that Water street be widened east and west from Vine street all the way to South street, in like manner as it is from the front of my dwelling to the front of my stores on the west side of Water street, and the regulation of the curbstones continued at the same distance from one another, as they are at present opposite to the said dwelling and stores, so that the regulation of th said street be not less than thirty-nine feet wide, and afford a large and convenient foot-way, clear of obstructions and incumbrances of every nature,

and the cellar doors on which, if any shall be permitted, not to extend from the buildings on to the foot-way more than four feet; the said width to be encreased gradually, as the fund shall permit, and as the capacity to remove impediments shall encrease, until there shall be a correct and permanent regulation of Water street on the principles above stated, so that it may run north and south as strait as possible: That the ten feet middle alleys, belonging to the public, and running from the centre of the east squares to Front street, all the way down across Water street to the river Delaware, be kept open and cleansed as city property, all the way from Vine to South street—that such part of each centre or middle alley as runs from Front to Water street be arched over with bricks or stone, in so strong a manner as to facilitate the building of plain and permanent stone steps and plat-forms, so that they may be washed and kept constantly clean: and that the continuance of the said alleys, from the east side of Water street be curbed all the way to the river Delaware and kept open forever—. . . (I understand that those middle or centre alleys were left open in the first plan of the lots, on the east front of the city, which were granted from the east side of Front street to the river Delaware, and that each lot on said east front has contributed to make those alleys by giving a part of their ground in proportion to the size of each lot; those alleys were in the first instance, and still are, considered public property, intended for the convenience of the inhabitants residing in Front street to go down to the river for water and other purposes; but, owing to neglect or to some other cause, on the part of those, who have had the care of city property, several encroachments have been made on them by individuals, by wholly occupying or building over, them, or otherwise, and in that way the inhabitants, more particularly those who reside in the neighborhood, are deprived of the benefit of that wholesome air, which their opening and cleansing throughout would afford): That the iron pipes, in Water

street, which, by being of smaller size than those in the other streets, and too near the surface of the ground, cause constant leaks, particularly in the winter season, which in many places render the street impassable, be taken up and replaced by pipes of the same size quality and dimensions in every respect, and laid down as deeply from the surface of the ground, as the iron pipes, which are laid in the main streets of the City: . . . and as it respects pumps for Schuylkill water and fire-plugs in Water street, that one of each be fixed at the south-west corner of Vine and Water streets, and so running southward, one of each near the steps of the centre alley going up to Front street; one of each at the south-west corner of Sassafras and Water streets, one of each near the steps of the centre alley going up to Front street, and so on at every south-west corner of all the main streets and Water street, and of the centre alleys of every square, as far as South or Cedar street; and when the same shall have been completed, that all Water street shall be repaved by the best workmen in the most complete manner, with the best paving water-stones, after the height of the curbstones shall have been regulated throughout, as well as the ascent and descent of the street, in such manner as to conduct the Water through the main streets and the centre alleys to the river Delaware, as far as practicable; and whenever any part of the street shall want to be raised, to use nothing but good paving gravel for that purpose, so as to make the paving as permanent as possible: . . . By all which improvements, it is my intention to place and maintain the section of the city above referred to in a condition which will correspond better with the general cleanness and appearance of the whole city, and be more consistent with the safety, health, and comfort of the citizens. And my mind and will are, that all the income, interest and dividends of the said capital sum of five hundred thousand dollars shall be yearly and every year expended upon the said objects, in the order in which I have stated them as closely as pos-

sible, and upon no other objects until those enumerated shall have been attained: and, when those objects shall have been accomplished, I authorize and direct the said The Mayor Aldermen and Citizens to apply such part of the income of the said capital sum of five hundred thousand dollars as they may think proper to the further improvement, from time to time, of the eastern or Delaware front of the City.

XXIII. I give and bequeath to the Commonwealth of Pennsylvania, the sum of three hundred thousand dollars, for the purposes of internal improvement by canal navigation, to be paid into the state treasury by my executors, as soon as such laws shall have been enacted by the constituted authorities of the said commonwealth as shall be necessary, and amply sufficient to carry into effect, or to enable the constituted authorities of the city of Philadelphia to carry into effect, the several improvements above specified; namely, 1. laws, to cause Delaware avenue, as above described, to be made, paved, curbed, and lighted; to cause the buildings, fences, and other obstructions now existing to be abated and removed; and to prohibit the erection of any such obstructions to the eastward of said Delaware avenue; 2. laws, to cause all wooden buildings as above described to be removed, and to prohibit their future erection within the limits of the city of Philadelphia; 3. laws, providing for the gradual widening, regulating, paving, and curbing of Water street, as hereinbefore described, and also for the repairing the middle alleys, and introducing the Schuylkill water, and pumps, as before specified—all which objects, may, I persuade myself, be accomplished on principles at once just into relation to individuals, and highly beneficial to the public: the said sum, however, not to be paid, unless said laws be passed within one year after my decease.

XXIV. And as it regards the remainder of said residue of my personal estate, in trust, to invest the same

in good securities, and in like manner to invest the interest and income thereof from time to time, so that the whole shall form a permanent fund; and to apply the income of the said fund:—

1. To the further improvement and maintenance of the aforesaid College as, directed in the last paragraph of the XXIst clause of this will.

2. To enable the Corporation of the City of Philadelphia to provide more effectually than they now do, for the security of the persons and property of the inhabitants of the said city, by a competent police, including a sufficient number of watchmen really suited to the purpose; and to this end, I recommend a division of the city, into watch districts or four parts, each under a proper head, and that at least two watchmen shall in each round or station patrol together.

3. To enable the said corporation to improve the city property, and the general appearance of the city itself; and, in effect to diminish the burden of taxation, now most oppressive especially on those, who are the least able to bear it:

To all which objects, the prosperity of the City, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year, for ever—after providing for the College as hereinbefore directed, as my primary object. But, if the said city shall knowingly and wilfully violate any of the conditions hereinabove and hereinafter mentioned, then I give and bequeath the said remainder and accumulations to the Commonwealth of Pennsylvania, for the purposes of internal navigation, excepting however, the rents issues and profits of my real estate in the City and County of Philadelphia, which shall forever be reserved and applied to maintain the aforesaid College, in the manner specified in the last paragraph of

the XXIst clause of this will: And, if the Commonwealth of Pennsylvania shall fail to apply this or the preceding bequest to the purposes before mentioned, or shall apply any part thereof to any other use, or shall for the term of one year, from the time of my decease, fail or omit to pass the laws hereinbefore specified for promoting the improvement of the city of Philadelphia, then I give devise and bequeath the said remainder and accumulations (the rents aforesaid always excepted and reserved for the College as aforesaid) to the United States of America for the purposes of internal navigation and no other.

Provided, nevertheless, and I do hereby declare, that all the preceding bequests and devises of the residue of my estate to The Mayor, Aldermen and Citizens of Philadelphia, are made upon the following express conditions, that is to say—First, that none of the monies, principal, interest, dividends, or rents, arising from the said residuary devise and bequest, shall at any time be applied to any other purpose or purposes whatever than those herein mentioned and appointed:—Second, that separate accounts, distinct from the other accounts of the corporation, shall be kept by the said corporation, concerning the said devise, bequest, college and funds, and of the investment and application thereof; and that a separate account or accounts of the same shall be kept in bank, not blended with any other account, so that it may at all times appear on examination by a committee of the legislature as hereinafter mentioned, that my intentions had been fully complied with:—Third, that the said corporation render a detailed account annually in duplicate to the legislature of the Commonwealth of Pennsylvania, at the commencement of the session, one copy for the senate and the other for the house of representatives, concerning the said devised and bequeathed estate, and the investment and application of the same, and also a report in like manner of the state of the said College, and shall submit all their books papers and accounts touching the

same, to a committee or committees of the legislature for examination, when the same shall be required: Fourth, the said corporation shall also cause to be published in the month of January, annually, in two or more newspapers printed in the city of Philadelphia, a concise but plain account of the state of the trusts, devises, and bequests herein declared and made, comprehending the condition of the said college, the number of scholars, and other particulars needful to be publicly known, for the year next preceding the said month of January, annually.

XXV. And whereas I have executed an assignment in trust of my banking establishment, to take effect the day before my decease, to the intent that all the concerns thereof may be closed by themselves, without being blended with the concerns of my general estate, and the balance remaining to be paid over to my executors: Now, I do hereby direct my executors, hereinafter mentioned, not to interfere with the said trust in any way except to see that the same is faithfully executed, and to aid the execution thereof by all such acts and deeds as may be necessary and expedient to effectuate the same, so that it may be speedily closed, and the balance paid over to my executors, to go, as in my will, into the residue of my estate: And I do hereby authorise direct and empower the said trustees from time to time, as the capital of the said bank shall be received, and shall not be wanted for the discharge of the debts due thereat, to invest the same in good securities in the names of my executors, and to hand over the same to them, to be disposed of according to this my will.

XXVI. Lastly—I do hereby nominate and appoint Timothy Paxson, Thomas P. Cope, Joseph Roberts, William J. Duane, and John A. Barclay, . . . executors of this my last will and testament: I recommend to them to close the concerns of my estate as expeditiously as

possible, and to see that my intentions in respect to the residue of my estate are and shall be strictly complied with; and I do hereby revoke all other wills by me heretofore made.

In witness, I, the said Stephen Girard have to this my last will and testament, contained in thirty-five pages, set my hand at the bottom of each page, and my hand and seal at the bottom of this page; the said will executed, from motives of prudence, in duplicate, this sixteenth day of February, in the year one thousand eight hundred and thirty.

STEPHEN GIRARD. (SEAL).

Signed, sealed, published, and declared by the said Stephen Girard, as and for his last will and testament, in the presence of us, who have at his request hereunto subscribed our names as witnesses thereto in the presence of the said testator and of each other, February 16, 1830.

JOHN H. IRWIN,
SAML. ARTHUR,
S. H. CARPENTER.

CODICIL

Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated the sixteenth day of February eighteen hundred and thirty, have, since the execution thereof, purchased several parcels and pieces of real estate, and have built sundry messuages, all which, as well as any real estate that I may hereafter purchase, it is my wish and intention to pass by the said will, now I do hereby republish the foregoing last will and testament dated February 16, 1830, and do confirm the same in all particulars: In witness, I the said Stephen Girard set my hand and seal hereunto the twenty-fifth day of December eighteen hundred and thirty.

Stephen Girard. (seal)

Signed sealed published and declared by the said Stephen Girard as and for a re-publication of his last will and testament in the presence of us, who at his request have hereunto subscribed our names as witnesses thereto in the presence of the said testator and of each other, Decr 25, 1830.

John H. Irwin,
Saml. Arthur,
Jno. Thomson.

CODICIL

Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated February 16, 1830, have, since the execution thereof, purchased several parcels and pieces of land and real estate, and have built sundry messuages, all which, as well as any real estate that I may hereafter purchase, it is my intention to pass by said will; and whereas, in particular, I have recently purchased from Mr. William Parker the mansion house, out-buildings, and forty-five acres and some perches of land, called Peel-Hall, on the Ridge Road in Penn Township, now I declare it to be my intention and I direct that the Orphan establishment, provided for in my said will, instead of being built as therein directed upon my square of ground between High and Chestnut and Eleventh and Twelfth streets in the city of Philadelphia, shall be built upon the estate so purchased from Mr. W. Parker, and I hereby devote the said estate to that purpose exclusively in the same manner as I had devoted the said square, hereby directing that all the improvements and arrangements for the said Orphan Establishment prescribed by my said will as to said square shall be made and executed upon the said estate, just as if I had in my will devoted the said estate to said purpose—consequently the said square of ground is to constitute and I declare it to be a part of the residue and remainder of my real and personal estate and given and devised for the same uses and purposes as are declared in section XX. of my will, it being my intention that the said square of ground shall be built upon and improved in such a manner as to secure a safe and permanent income for the purposes stated in said XXth section: In witness whereof I, the said Stephen Girard set my hand and seal hereunto the twentieth day of June eighteen hundred and thirty-one.

STEPHEN GIRARD. (SEAL)

Signed sealed published and declared by the said Stephen Girard as and for a re-publication of his last will and testament and a further direction in relation to the real estate therein mentioned, in the presence of us who at his request have hereunto subscribed our names as witnesses thereto in the presence of the said testator and of each other, June 20, 1831.

S. H. CARPENTER,
L. BARDIN,
SAML. ARTHUR.

Philadelphia, December 31, 1831. Then personally appeared Saml. Arthur and S. H. Carpenter two of the Witnesses to the foregoing Will and the second Codicil or republication thereof and on their Oaths did say that they were present and did see and hear Stephen Girard the Testator in the said Will and second republication thereof named, sign seal publish and declare the same as & for his last Will and Testament and republication thereof and that at the doing thereof he was of sound mind memory and understanding to the best of their knowledge and belief—And at the same time appeared Jno. Thomson, one of the Witnesses to the first republication of said will, and on his solemn affirmation did say that he was present, and did see and hear Stephen Girard the Testator in the first republication of said Will named sign seal publish and declare the same as and for a republication of his last Will and Testament and the said Samuel Arthur, another of the witnesses to said republication of said will on his oath did further say that he was present and did see and hear Stephen Girard the Testator in the first republication of said Will named sign seal publish and declare the same as and for a republication of his last Will and Testament,

and they both did say that at the doing thereof he was of sound mind, memory and understanding; to the best of their knowledge and belief.

CORAM,

J. HUMES,

Register.

December 31, 1831. Timothy Paxson and Thomas P. Cope, two of the Executors, affirmed—and Joseph Roberts, William J. Duane, and John A. Barclay the other Executors sworn and Letters Testamentary were granted unto them.

APPENDIX B.

Pennsylvania Act of March 24, 1832, P. L. 176 (1831-1832 Volume).

AN ACT

To enable the Mayor, Aldermen, and citizens of Philadelphia to carry into effect certain improvements, and execute certain trusts.

WHEREAS, By the last will and testament of Stephen Girard, late of the city of Philadelphia, deceased, the sum of five hundred thousand dollars is bequeathed to the mayor, aldermen, and citizens of Philadelphia, in trust among other things, to apply the income thereof "first, to lay out, regulate, curb, light and pave a passage or street on the east part of the city of Philadelphia, fronting the river Delaware, not less than twenty-one feet wide, and to be called Delaware Avenue; extending from South or Cedar Street, all along the east part of Water street squares, and the west side of the logs which form the heads of the docks, or thereabouts; and to this intent, to obtain such acts of assembly, and to make such purchases or agreements as will enable the mayor, aldermen, and citizens of Philadelphia to remove or pull down all the buildings, fences, and obstructions which may be in the way, and to prohibit all buildings, fences, or erections of any kind to the eastward of said avenue, to fill up the heads of such of the docks as may not afford sufficient room for the said street, to compel the owners of wharves to keep them clean, and covered completely with gravel or other hard materials, and to be so levelled that water will not remain thereon, after a shower of rain, to completely clean, and keep clean, all the docks within the limits of the city, fronting on the Delaware; and to pull down all platforms carried out from the east part of the city, over the river Delaware, on piles or pillars." "Sec-

ond, To pull down and remove all wooden buildings, as well as those made of wood and other combustible materials as those called brick-paned, or framed buildings, filled in with bricks, that are erected within the limits of the city of Philadelphia; and also to prohibit the erection of any such building within the said city's limits at any future time." "Third, to widen, pave, and curb Water street, and to distribute the Schuylkill water therein, upon" a certain plan therein set forth. Now, for the purpose of enabling the mayor, aldermen, and citizens of Philadelphia aforesaid, to effect the improvements contemplated by the said testator, and to execute in all other respects the trusts created by his will, to enable the constituted authorities of the city of Philadelphia to carry which into effect, the said Stephen Girard has desired the legislature to enact the necessary laws.

SECT. 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That it shall and may be lawful for the mayor, alderman and citizens of Philadelphia, by ordinance lawfully enacted, or the intervention and act of authorized officers or agents, to lay out, regulate, curb, light, and pave a passage or street, not less than twenty-one feet in width, on the east part of the city of Philadelphia, fronting the river Delaware, at such distance or distances in the several parts thereof from the eastern line of Water street as they shall judge proper, extending from Vine to Cedar street, to be called the Delaware Avenue; and that, having laid out such street, they shall cause a record of the same to be made in the court of Quarter Sessions for the county of Philadelphia.

SECT. 2. *And be it further enacted by the authority aforesaid,* That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia aforesaid, in manner aforesaid, to lay out Water street, in the said city, anew, in

such manner as that the same shall be as nearly straight as conveniently may be, and of a uniform, or as near as may be uniform width throughout, not less than thirty-nine feet, if practicable, and the same to open and keep open for ever, as a common and public highway; and that having laid out said Water street of such increased width, they shall cause a record of the same to be made in the court of Quarter Sessions for the county of Philadelphia.

SECT. 3. *And be it further enacted by the authority aforesaid*, That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia aforesaid, to pass ordinances, or take other measures for regulating, adjusting, and determining the easternmost line to which wharves may thereafter lawfully be constructed on the river Delaware, fronting said city, and to cause a record of such regulated line to be made in the court of Quarter Sessions for the county of Philadelphia; to fix and decide on, or cause their officers to fix and decide on the levels of all wharves fronting the said city, and to declare the regulation thereof; to require the owners thereof to pave the same or to lay them with gravel, according to such regulation, so as effectually to drain and pass off the water from the same, and to require all persons owning and occupying or using docks or wharves, to cleanse the same and to keep the same in repair, and to prescribe the form, materials, and character of workmanship of all wharves hereafter to be constructed, and to require all platforms now projecting into the river Delaware, and supported on piles, pillars or piers, to be removed, and to prohibit the construction, in future, of any such projecting platforms; and to require the removal, and prohibit the construction, in future, of all buildings, fences, and other obstructions, to the eastward of Delaware Avenue, above mentioned, and to declare all erections and constructions whatsoever, contrary to the said ordinances, whether erected before or after the passage of the same to be nuisances, and generally to devise, ordain and execute whatever other things shall by them, the said mayor, alder-

men, and citizens of Philadelphia aforesaid, be deemed necessary or convenient for the good arrangement, security and government of the said wharves: *Provided,* That the easternmost line of the said wharves shall not be held to be finally determined, and the record thereof shall not be made, as aforesaid, unless the board of wardens, of the port of Philadelphia, shall decide and make their certificate in writing, that such easternmost line is not inconsistent with the public interests, which certificate shall also be recorded in the said court of Quarter Sessions; but if the said certificate shall not be granted by them, within three months after application made therefor, the refusal or omission of the said board of wardens to grant such certificate, shall, when duly verified by affidavit, be esteemed the judgment and decision of the said board of wardens, that such easternmost line is inconsistent with the public interests, and in case such a decision shall in any wise be made, an appeal shall lie therefrom to the said court of Quarter Sessions, as in other cases, and the judgment of the said court, in favor of such regulated line, shall be, for all purposes, equivalent to a similar decision by the said board of wardens: *Provided,* That nothing herein contained shall be construed to give authority to any one to erect wharves, or piers, extending out as far as the said regulated easternmost line, without license from the said board of wardens, as heretofore.

SECT. 4. *And be it further enacted by the authority aforesaid,* That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia aforesaid, to pass ordinances, prohibiting the construction within the said city, or any parts thereof, of all framed or brick-paned or other buildings, the walls whereof are not wholly composed of incombustible materials, determining the thicknesses of which walls of buildings of different dimensions and character shall hereafter be made in the said city, and in making all such other legal provisions as they shall think expedient

for preventing the extension of injuries from fire, in the said city, and to declare all buildings, the walls whereof are not wholly composed of incombustible materials, to be nuisances.

SECT. 5. *And be it further enacted by the authority aforesaid,* That when any of the said ordinances shall have been passed, or other proceedings had in relation to the said Delaware Avenue and Water street, or either of them, and the record thereof shall have been made as aforesaid, it shall be lawful for the mayor, aldermen, and citizens of Philadelphia aforesaid, to proceed, from time to time, to open for public use, any part or parts thereof, and the same to keep open as common and public highways forever; and to that end, to enter upon such property as may be found to be within the same, construct wharves extending into the river, within the lines of said Delaware Avenue, and to a reasonable distance beyond the same, and fill up all docks within the limits thereof, and remove all obstructions, of whatever kind, from within the limits of said avenue and street, or any parts thereof, and level, drain, pitch, and pave the same, as other streets in the said city. And from and after the passing of such ordinances, and the record of the said avenue and street, all buildings, thereafter erected or rebuilt on the said avenue and street shall conform to the recorded limits of the same, and the mayor, aldermen and citizens of Philadelphia aforesaid, may pass ordinances, declaring all obstructions within the same to be nuisances.

SECT. 6. *And be it further enacted by the authority aforesaid,* That it shall at all times be lawful for the mayor, aldermen and citizens of Philadelphia, aforesaid, to remove and abate any building, erection or obstruction whatever, which, by this act, or by any ordinance to be hereafter passed by virtue of it, may be declared a nuisance: *Provided,* That if such building, erection or obstruc-

tion shall have been in existence at the time of the passage of this act, or of such ordinance passed by virtue hereof, the mayor, aldermen and citizens aforesaid shall give at least three months notice of their intention to remove the same to the persons having the ownership, occupation or use thereof, or in case no such persons shall be known to them, then they shall affix a copy of such notice to and upon such building, erection or obstruction, three months before proceeding to remove the same.

SECT. 7. *And be it further enacted by the authority aforesaid,* That it shall be lawful for the said the mayor, aldermen and citizens of Philadelphia, aforesaid, to provide for the punishment of any person or persons who shall commit any nuisance contrary to the intent and meaning of this act, and of the ordinances which may be passed by virtue thereof, and of any person or persons who having committed any such nuisance, shall, after notice, refuse or neglect to remove the same.

SECT. 8. *And be it further enacted by the authority aforesaid,* That all persons whatsoever who shall receive damage to their property by reason of any thing which shall have been done by the mayor, aldermen and citizens of Philadelphia, under this act, or any ordinances passed by virtue hereof, may, after ten days notice of such their intention, to the mayor, aldermen and citizens aforesaid, apply by petition in writing, to the court of Quarter Sessions for the county of Philadelphia, who shall thereupon appoint a jury of twelve disinterested freeholders, citizens of the city of Philadelphia, which jury shall assemble, after ten days notice of their meeting, given as aforesaid; and shall be sworn or affirmed to inquire what damages the petitioners, or any of them, have sustained by reason of any thing so done, considering as well the advantages which may accrue to such petitioners as the injuries by them complained of, and the said jury having viewed the

premises and heard the parties, or their counsel, shall report in writing, under the hands of at least ten jurors, and their report having been considered and confirmed by the court, the damages thereby found shall be paid by the mayor, aldermen and citizens aforesaid, in six months after the confirmation of the said report.

SECT. 9. *And be it further enacted by the authority aforesaid,* That if the mayor, aldermen, and citizens aforesaid, shall deem it expedient that the damages should be legally ascertained before proceeding to enter on premises for the purpose of removing obstructions, and before appropriating to public use any property of individuals, or otherwise injuriously affecting the rights and interests of any proprietor, the mayor, aldermen and citizens aforesaid may, from time to time apply to the court of Quarter Sessions for the county of Philadelphia, by petition, in writing, specifying therein as nearly as may be the persons and property in regard to which they desire that the damages should be ascertained, and thereupon the said court shall appoint a jury of twelve disinterested freeholders, citizens of the city of Philadelphia, which jury shall assemble, after ten days notice of their meeting given to the owners or occupiers of the property, and shall be sworn or affirmed, as is provided in the foregoing section of this act, and having viewed and heard, as is therein provided, shall report in writing, under the hands of at least ten jurors, specifying in their said report as well the causes for which damages, if any should be paid, as the amounts of such damages, and in such case the mayor, aldermen and citizens aforesaid may, within one year after the confirmation of such report by the court of Quarter Sessions, tender to any owner of property named therein, the amount of damages thereby found in his favor, or may pay the same into court, for his use and benefit, and may thereafter proceed to enter upon the premises, and remove the obstructions, or appropriate the property for which dam-

ages shall have been so paid or tendered, first giving three months notice to the tenant in possession, if any: *Provided however,* That if the amount so found by such jury in favor of any owner, shall not be so tendered or paid within one year after the confirmation of such report, then the proceedings had upon the said petition of the mayor, aldermen, and citizens aforesaid, shall, so far as relates to the said owner, be null and void, and the mayor, alderman, and citizens aforesaid, may thereafter present their petition in writing anew, under this section, as if no proceedings had before been had: *And provided also,* that when a report shall have been made by a jury, under the provisions of this section, and damages shall have been tendered or paid, in accordance therewith, if thereafter any other damage than that reported on shall be sustained, the party aggrieved may thereafter apply, in regard to such other damages, for a jury to assess the same, under the eighth section of this act: *Provided further,* That it shall at all times be competent to the mayor, aldermen, and citizens aforesaid, to agree with any owner or owners of property, so to be taken, removed, or affected for the damages thereby to be occasioned, and such agreement shall be instead of any of the proceedings detailed in this or the foregoing sections of this act: And, forasmuch as in the course of time it may appear that powers are not vested in the said the mayor, aldermen, and citizens of Philadelphia which may be yet required to the full execution of those parts of the said will of the said Stephen Girard, for the carrying of which into effect he has in his said will requested legislative provision, and it is the object and intent of this act fully to confer all such powers.

SECT. 10. *Be it further enacted by the authority aforesaid,* That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia, to exercise all such jurisdiction, enact all such ordinances, and do and execute all such acts and things whatsoever as may be necessary and con-

venient for the full and entire acceptance, execution and prosecution of any and all the devises and bequests, trusts and provisions contained in the said will, which are the subjects of the preceding parts of this act, and to enable the constituted authorities of the city of Philadelphia to carry which into effect, the said Stephen Girard has desired the legislature to enact the necessary laws.

SECT. 11. *And be it further enacted by the authority aforesaid,* That no road or street shall be laid out, or passed through the land in the county of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the same shall be recommended by the Trustees or Directors of said college, and approved of by a majority of the select and common councils of the city of Philadelphia.

SUPREME COURT

FILED
JUL 23 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957. NO. 947.

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH, Mayor of the City of Philadelphia, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST and ROBERT FELDER,

Appellants,

v.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA AND THIRTEEN SUBSTITUTED TRUSTEES OF THE ESTATE OF STEPHEN GIRARD, Deceased,

Appellees.

On Appeal From the Supreme Court of Pennsylvania.

MOTION AND PETITION OF WILLIAM ASHE FOUST AND ROBERT FELDER FOR REHEARING OF ORDER OF JUNE 30, 1958, REFUSING TO NOTE PROBABLE JURISDICTION AND DENYING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 947.

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH, MAYOR OF THE CITY OF PHILADELPHIA, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST AND ROBERT FELDER,

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v.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA AND THIRTEEN SUBSTITUTED TRUSTEES OF THE ESTATE OF STEPHEN GIRARD, DECEASED,

Appellees.

MOTION AND PETITION OF WILLIAM ASHE FOUST AND ROBERT FELDER FOR REHEARING OF ORDER OF JUNE 30, 1958, REFUSING TO NOTE PROBABLE JURISDICTION AND DENYING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

To the Honorable Earl Warren, The Chief Justice of the United States, and to The Associate Justices of the Supreme Court of the United States:

William Ashe Foust and Robert Felder respectfully move this Court pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954, for a rehearing on the Order made herein on June 30, 1958 which refused to note Probable Jurisdiction and denied petitioners' request for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania to review its judgment in this case.

STATEMENT.

On April 23, 1958 a Jurisdictional Statement was filed in this Court, which in the alternative, pursuant to 28 U. S. C. § 2103 requested this Court to issue a Writ of Certiorari under 28 U. S. C. § 1257(3) to the Supreme Court of the Commonwealth of Pennsylvania to review its judgment in this case. The questions presented in that Jurisdictional Statement were as follows:

"On April 29, 1957, this Court held that the Board of Directors of City Trusts, the City agency created by the Pennsylvania Act of June 30, 1869, P. L. 1276, to administer Girard College, violated the rights of Negro appellants guaranteed them by the Fourteenth Amendment when it rejected their application for admission solely because of their race, even though Girard's will provided that the school was for "poor, male, white orphan children." *Pennsylvania v. Board of Directors of City Trusts*, 353 U. S. 230. This Court also held that the admission policies of the College were subject to this Court's ruling in *Brown v. Board of Education*, 347 U. S. 483. The Orphans' Court of Philadelphia County on remand, without hearing, notice or request of any party to the litigation, on its own motion, and in a proceeding whose only purpose was to obtain an order requiring the admission of certain Negroes to Girard College, removed the City of Philadelphia as trustee of the entire Girard Estate and appointed a "private" group of thirteen trustees, six of whom (the majority of the Board) were appointed upon the express condition and order that they resign from their governmental positions as members of the Board of Directors of City Trusts. The Orphans' Court then dismissed the petition of the Negro appellants for admission to Girard College solely on the grounds of their race. On appeal to the Supreme Court of Pennsylvania, counsel for the substituted trustees appeared although no petition to intervene had been filed. Counsel for the Board of City Trusts entered his appearance as ap-

pellee, but failed to appear at argument to protest the Board's removal. The Supreme Court of Pennsylvania held that while there exists the general common law power, the jurisdiction to remove the public trustees was conferred upon the Orphans' Court of Philadelphia County by Section 331(5) of the Fiduciaries Act of April 18, 1949, P. L. 512, 20 Purd. Stat. § 320.331, which provides that the court can remove a trustee "when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office." The court below affirmed the orders.

The questions presented are:

1. Whether Section 331(5) of the Fiduciaries Act of April 18, 1949, P. L. 512, 20 PURD. STAT. § 320.331, violates the Fourteenth Amendment to the Constitution of the United States in so far as it authorizes or requires the judicial ouster of public trustees named in Girard's Will and authorized by state statute, when such judicial ouster is for the express and sole purpose of continuing the exclusion of Negro appellants from Girard College solely because of their race.

2. Whether the exercise of state judicial power to remove a trustee violates the Fourteenth Amendment when the expressed and sole purpose and effect of its exercise is to deprive Negro appellants of their previously adjudicated constitutional right to attend Girard College.

3. Whether a state, consistently with the Fourteenth Amendment can convert a publicly operated school into a "private" school solely for the express purpose of denying Negroes their previously adjudicated constitutional right to attend the school prior to the conversion.

4. Whether, despite the removal of a municipal agency as trustee, Girard College is not still in constitutional contemplation a public institution whose admissions policies are subject to the limitations of the Fourteenth Amendment.

(a) Because there remains in force so many other substantial forms of governmental supervision, subsidy and control; particularly, the requirement that the City of Philadelphia remain as guardian for all students at Girard College;

(b) Because the "new" trustees include the majority of the appointed members of the Board;

(c) Because the "new" trustees have been ordered to administer not only Girard College, but all the other trusts established for the public welfare by Girard's Will;

(d) Because Girard College cannot in any event escape the century of history in which governmental nurture of every kind has translated Stephen Girard's testamentary desires into a great public institution and increased the estate from $2,000,000 to $100,000,000.

5. Whether the action of the Pennsylvania courts on remand from this Court was inconsistent with the mandate of this Court.

6. Whether the appointment of "private" trustees not contemplated by the will does not impair the rights of the Government of the United States which was named ultimate successor trustee by Stephen Girard."

On June 30, 1958, this Court entered an order which denied the Writ of Certiorari and dismissed the appeal.[1]

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1. Appellants submit that the appeal jurisdiction of this Court was appropriately invoked on the authority of *McCollum v. Board of Education*, 333 U. S. 203. They assume that the dismissal of the appeal was on the basis of appellees' representation that the constitutionality of the statute involved was not raised in the Orphans' Court. See Appellees' Motion, p. 15. Appellants never had an opportunity to raise it in the Orphans' Court, there being no notice or hearing. In the Supreme Court of Pennsylvania Appellees relied upon the statute as the basis for the Orphans' Court's action (Brief for Substituted Trustees, Appellees, Sup. Ct. of Pa. Jan. Term, 1958, Nos. 109-121, p. 18.), and, furthermore, urged that appellants could not complain of a denial of a hearing in the Orphans' Court because

JURISDICTION OF THIS COURT.

This motion for rehearing is made pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954.

The grounds on which this motion is made are intervening circumstances of substantial or controlling effect (*NAACP v. Alabama*, October Term, 1957, No. 91, decided June 30, 1958), other substantial grounds available to petitioners although not previously presented (*Capital Federal Saving & Loan Ass'n v. Smith*, 316 P. 2d 252 (Colo. 1957)) and certain policy considerations showing the general applicability of the questions presented not heretofore raised.

REASONS FOR GRANTING THE MOTION AND PETITION.

The press coverage, both national and local, given this Court's action on June 30, 1958, reaffirms that this case presents questions whose resolution have immediate importance far beyond the particular facts and parties involved. The Court's action was interpreted as if this Court had "ruled that the appointment of private trustees for Girard College was legal, and, in effect, sustained the refusal to

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"They are being given an adequate opportunity to present their arguments before this Court [Sup. Ct. of Pa.]". See Brief for Substituted Trustees, Appellees, Sup. Ct. of Pa. Jan. Term 1958, Nos. 109-121, pp. 26-27. Thus, Appellees avoided the argument of a lack of hearing in the Orphans' Court by asserting that due process was observed since Appellants had the right to present their arguments in the Supreme Court of Pennsylvania. Now, however, they say petitioners are precluded from raising the issues here because the issue was first raised in the Supreme Court of Pennsylvania. Appellants clearly raised the issue in the Supreme Court of Pennsylvania and that Court clearly passed upon it. See Jurisdictional Statement, pp. 6-7. Accordingly petitioners here did not argue lack of due process; but they strenuously urged the unconstitutionality of the Fiduciaries Act of April 18, 1949, section 331(5), as applied. Thus, it would seem that the Appeal is proper.

admit Negro students" see *Philadelphia Evening Bulletin,* July 1, 1958, page 1; *The Philadelphia Evening Bulletin,* July 9, 1958, page 34. Petitioners are convinced that the action of the Pennsylvania Courts violated rights guaranteed them by the Fourteenth Amendment and that the decision is not an isolated decision of a state court, which though in error does not present that recurring type of situation which this Court will review. There are countless numbers of trust funds administered by State and Municipal bodies. In Philadelphia alone there are over ninety and its position is not unique. See Petition for Rehearing, U. S. Sup. Ct. Oct. Term, 1956, No. 769, p. 28 in *Commonwealth v. Board of Directors of City Trust,* 353 U. S. 230. The fact that this Court reviewed an earlier stage of this very case necessarily negates any contention that Girard College presents an isolated situation. Petitioners are constrained, therefore, to file this Petition for Rehearing asserting the following grounds:

1. A basic issue in this case is whether common law or statutory state judicial power can be employed to change trustees when the change is for the sole purpose of putting in private trustees who it is hoped can refuse on the basis of race, without violating the Fourteenth Amendment, Negroes admission to an institution previously adjudicated as being subject to constitutional limitations imposed by the Fourteenth Amendment. In other words the issue is whether State judicial action violates the Fourteenth Amendment where the result of the State action is to permit private persons to take action which they can take only after the state courts by the use of judicial power have altered the status quo and which the state itself could not take. This Court, on June 30, 1958, for the first time, clearly and unequivocally held that State judicial action so described violated the Fourteenth Amendment. In *NAACP v. Alabama,* Oct. Term, 1957, No. 91, 26 United States Law Week 4489, (decided June 30, 1958) this Court held:

> "It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from State action but from private community pressures. The crucial factor is the interplay of Governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold." p. 4493

Since the Fourteenth Amendment denies Alabama the power to apply its common law discovery rule upon a showing that private persons will assert economic pressures on Negroes whose NAACP membership is disclosed, it would seem that Pennsylvania must necessarily be denied the power to apply its common law or statutory rule to substitute trustees where the admitted effect and sole reason for its exercise is to permit private persons to do what the named governmental trustee could not do, to wit, refuse Negroes admission. Cf. *Derrington v. Plummer,* 240 F. 2d 922 (5th Cir., 1956), *cert. denied,* 1 L. Ed. 2d 719.

Moreover in *NAACP v. Alabama, supra,* this Court held "It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." (p. 4493).

If the Pennsylvania Legislature had attempted to pass legislation ousting the governmental trustee solely because it would have to admit Negroes such statute would not square with the Fourteenth Amendment. See *e.g., Adkins v. School Board of the City of Newport News,* 148 F. Supp. 430, 444-445 (E. D. Va., 1957), *aff'd,* 246 F. 2d 325 (4th Cir., 1957); *Orleans Parish School Board v. Bush,* 242 F. 2d 156, 162 (5th Cir., 1957). The same constitutional restrictions are applicable to state courts. *NAACP v. Alabama, supra* at p. 4493.

2. The decision of the Supreme Court of Pennsylvania is in conflict with the recent decision of the Supreme Court of Colorado in *Capital Federal Saving and Loan Association v. Smith*, 316 P. 2d 232 (Colo. 1957), noted in 58 COLUM. L. REV. 571 (1958). In that case plaintiffs, Negroes, purchased property in an area which by agreement among plaintiffs' predecessors in title and adjoining land owners, was subject to an executory limitation which provided that any land conveyed to a colored person "shall be forfeited to . . . the then owners of . . . [other] lots . . . who may assert title thereto by filing for record notice of their claim with the recorder of . . . Denver". The court there held that an executory interest to take effect in possession upon conveyance of property to a Negro, tended to prevent the purchase of property by a Negro, and is unenforceable in state courts. The decision of the Pennsylvania Supreme Court instead accepts *Charlotte Park and Recreation Commission v. Barringer*, 242 N. C. 311, 88 S. E. 2d 114 (1955), *cert. denied*, 350 U. S. 983, where the North Carolina court refused to apply the rationale of *Shelley v. Kraemer*, 334 U. S. 1, to a limitation under which property was granted to a Park Commission so long as it was used as a recreational facility for whites only. The court reasoned that the limitation created a determinable fee in the Park Commission and a possibility of reverter in the grantor to take effect automatically if Negroes were permitted to use the property, and since title would automatically vest in the grantor without judicial intervention on the happening of the contingency (use by Negroes), *Shelley v. Kraemer*, was not applicable. In the instant case, the Supreme Court of Pennsylvania applied this latter reasoning even though here the divesting of the property from the City occurs by the use of the very judicial intervention, the absence of which the North Carolina courts thought determinative in *Charlotte Park and Recreation Commission v. Barringer*, *supra*. This Court should review the Pennsylvania case to make it clear that "outmoded common law terms" in no

way alters the rule that state judicial power can not be used to make effective, indeed possible, subsequent racial segregation by private persons.

To be sure, this Court does not normally grant certiorari where there is a conflict of decisions among state courts, cf. Rule 19(1)(b). Here, however, the conflict between Colorado on the one hand, and North Carolina and Pennsylvania, on the other hand, rises out of the interpretation of the Fourteenth Amendment and this Court's decision in *Shelley v. Kraemer*, 334 U. S. 1. This type of conflict clearly warrants the exercise of this Court's certiorari jurisdiction.

In any event, it is clear that the Pennsylvania Court has decided a federal question of substance in a way which is definitely not in accord with the applicable decisions of this Court. Cf Rule 19(1)(a).

3. Municipalities throughout the country own outright or in trust many types of property including schools, swimming pools and recreational facilities and in many instances the land was acquired by deed of trust or otherwise under an instrument which limits the use thereof to particular racial groups. See, *e.g.*, *Woods v. Bell*, 195 S. W. 902 (Texas, 1917); *Charlotte Park and Recreation Commission v. Barringer*, *supra*.

Recent decisions of this Court make it clear that these racial limitations can no longer be applied by the governmental body. *Pennsylvania v. Board of Directors of City Trusts*, 353 U. S. 230. As the Board of Directors of City Trusts of the City of Philadelphia pointed out in their Petition for Rehearing in 353 U. S. 230 this decision left open the equally widespread problem whether the racial restriction can be continued merely by transferring the property to a so-called private group. Lower federal courts have usually held that after such transfer the constitutional restriction remains. Cf: *Derrington v. Plummer*, 240 F. 2d 923 (5th Cir., 1956).

But more fundamental is, as this Court has pointed out, the duty which this Court has to enforce the Fourteenth Amendment, also "rests upon the member of the several state legislatures and all executive . . . officers of the several states." *Borders v. Rippy*, 247 F. 2d 268, 272 (5th Cir., 1957). In the instant litigation the Mayor of the City of Philadelphia, City Council and the Commonwealth through its Attorney General recognized their obligations to see to it that the Fourteenth Amendment was observed. Petitioners believe this is the first case where state officials have been alert to their responsibilities and commenced litigation to force an institution to comply with the Fourteenth Amendment. Yet the sole result of this salutary recognition is that public responsibilities for over a hundred million dollars of property is eliminated. It will necessarily have a debilitating effect upon State officials to accept their responsibility under the Fourteenth Amendment if the recognition thereof can permit state judicial action to oust them of responsibility as trustees which they have accepted for the general public good.

If the Pennsylvania decision is left standing it also presents the inference that this Court's decisions in the field of racial segregation can be undone simply by state judicial action which call school board members private individuals or trustees. It would seem greatly in the public interest to get this important question, which obviously will come up and be recurring, settled in a law suit originating in a state whose public executive, judicial and legislative officials will without a doubt follow this Court's decision.

4. The alertness of the state executive and legislative officials to their responsibilities to enforce the Fourteenth Amendment might have led this Court to assume that legislative action in the Commonwealth of Pennsylvania could be employed to eliminate the racial restriction, thus making unnecessary the exercise of more drastic federal

constitutional power. *Cf. Rice v. Sioux City Memorial Park Cemetery Inc.*, 349 U. S. 70, 73-75; *Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512 (1949), *cert. denied*, 339 U. S. 981. But the "stark fact" is that those who have resisted petitioners' admission in this case have maintained that State or Federal, Legislative or Judicial or even Constitutional power can never open up Girard College to Negroes. Moreover, since this Court's action of June 30, 1958 has generally been interpreted as approval of the Pennsylvania Court's action, it will be difficult to get the "private" trustees to recognize their social duty to admit Negroes even if not required by the Federal Constitution, especially since their claimed defense was based upon the constitutional rights of white orphans.

CONCLUSION.

The rehearing of the Order denying the Petition for a Writ of Certiorari and refusing to note Probable Jurisdiction should be granted and on such rehearing the judgment below reversed.

Respectfully submitted,

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Certificate of Counsel.

The undersigned, counsel for the petitioners, hereby certify the foregoing Petition is presented in good faith and not for delay, and said Petition is confined to intervening circumstances of substantial or controlling effect and to other substantial grounds available to Petitioners although not previously presented.

WILLIAM T. COLEMAN, JR.
RAYMOND PACE ALEXANDER
LOUIS H. POLLAK

Dated Philadelphia, Pennsylvania
July 21, 1958.